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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

VIRGINIA HURST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Attorney General's Office may prosecute breaches of civil, regulatory provisions of the Tennessee Code as criminal conduct under 18 U.S.C. § 1955 of the Organized Crime Control Act.

II. Whether the conflict in authority between the Sixth and the Ninth Circuits regarding the necessity of undergoing a civil, regulatory / criminal, prohibitory analysis of a state statute to determine whether the statute's violation may satisfy the "violation of the law of the forum state" requirement of 18 U.S.C. § 1955 of the Organized Crime Control Act, which conflict has been noted but expressly not decided by this Honorable Court in California v. Cabazon Bank of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 1091 (1987), should be decided in favor of the petitioner.

III. Whether the federal government's affirmative reliance on an unconstitutional, void ab initio state statute in its indictment and in its case in chief to establish an essential element of the offenses charged violated Petitioner's Due Process rights.

PARTIES TO THE PROCEEDING BELOW

United States of America

Mrs. Virginia R. Hurst

Mr. Sam T. Burnett

Mr. Eddie E. Shutt

TABLE OF CONTENTS

TABLE OF AUTHORITIES vii

CITATION OF THE OPINION BELOW 1

STATEMENT OF JURISDICTION 2

CITATION TO STATUTES AND CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 5

ARGUMENT 34

I. THE UNITED STATES ATTORNEY GENERAL'S OFFICE MAY NOT PROSECUTE BREACHES OF CIVIL, REGULATORY PROVISIONS OF THE TENNESSEE CODE AS CRIMINAL CONDUCT UNDER 18 U.S.C. § 1955 OF THE ORGANIZED CRIME CONTROL ACT. 34

II. THE CONFLICT IN AUTHORITY BETWEEN THE SIXTH AND NINTH CIRCUITS REGARDING THE NECESSITY OF UNDERGOING A CIVIL, REGULATORY / CRIMINAL, PROHIBITORY ANALYSIS OF A STATE STATUTE TO DETERMINE WHETHER THE STATUTE'S VIOLATION MAY SATISFY THE "VIOLATION OF THE LAW OF THE FORUM STATE" REQUIREMENT OF 18 U.S.C. § 1955 OF THE ORGANIZED CRIME CONTROL ACT SHOULD BE RESOLVED IN FAVOR OF THE PETITIONER. 49

III. THE FEDERAL GOVERNMENT'S RELIANCE ON AN UNCONSTITUTIONAL, VOID AB INITIO STATE STATUTE IN ITS INDICTMENT AND IN ITS CASE IN CHIEF TO ESTABLISH AN ESSENTIAL ELEMENT OF THE OFFENSE ALLEGED VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT OF THE DUE PROCESS OF LAW. 57

CONCLUSION 62

APPENDIX:

Opinion of the Sixth Circuit 1a

T.C.A. § 39-6-609. . . . . .45a

18 U.S.C. § 1955 . . . . . 61a

Article XI, Section 5, Constitution of the State of Tennessee 65a

TABLE OF CASES AND AUTHORITIES

I. CASES

Aquino, United States v.,
336 F.Supp. 737 (E.D.Mich.1972)..... 35

Barona Group of Capitan Grande Band
of Mission Indians v. Duffy,
694 F.2d 1185 (9th Cir. 1982)..... 53,55

Bass, United States v.,
404 U.S. 336, 92 S.Ct. 515,
30 L.Ed.2d 488 (1971)..... 51

Berent, United States v.,
523 F.2d 1360 (9th Cir. 1975)..... 37

Bridges, United States v.,
493 F.2d 918 (5th Cir. 1974) 38

California v. Cabzon Bank of
Mission Indians,
480 U.S. 202, 107 S.Ct.
1083, (1987)..... 54,55

Chiarizio, United States v.,
525 F.2d 289, 294
(2d Cir. 1975) 36,39

Dakota, United States v.,
796 F.2d 186 (6th Cir. 1986)..... 53

Ernest and Ernest v. Hochfelder,
425 U.S. 185, S. Ct. 1375,
47 L. Ed. 2d 668 (1976)..... 42

Ex Parte Siebold,
100 U.S. 371, 376-77 (1879)..... 61

Farris, United States v.,
624 F.2d 890 (9th Cir. 1980) 38,53

Franks v. State,
772 S.W.2d 428 (Tenn. 1989) 57

Gordon, United States v.,
464 F.2d 357 (9th Cir. 1972) 35

Hawes, United States v.,
529 F.2d 472 (5th Cir. 1976) 38

Norton v. Shelby County,
118 U.S. 425 (1886)..... 57

Oneida Tribe of Indians of Wisconsin
v. Wisconsin,
518 F.Supp. 712 (W.D. Wis. 1981) .. 53,55

Owen of Georgia, Inc. v. Shelby County,
648 F.2d 1084 (6th Cir. 1981) 41

Papachristou v. City of Jacksonville,
405 U.S. 156, 92 S. Ct. 839,
31 L. Ed.2d 110 (1972) 57

Pollack v. Baxter Manor Nursing Home,
716 F.2d 545 (8th Cir. 1983) 59

Secretary v. St. Augustine Church,
766 S.W.2d 499 (Tenn. 1989)..... passim

Seminole Tribe of Florida v. Butterworth,
658 F.2d 310 (5th Cir. 1981)..... 53,55

II. OTHER AUTHORITIES:

21 A.L.R. Fed. 703 34

Tennessee Constitution Article XI,
Section 5 5

T.C.A. § 39-6-609 ..... passim

T.C.A. § 39-6-609(a) ..... passim

T.C.A. § 39-6-609(a)(1) 5,6

T.C.A. § 39-6-609(a)(2) 24,25

T.C.A. § 39-6-609(b) 11,44

T.C.A. § 39-6-609(b)(5) 22

T.C.A. § 39-6-609(b)-(i) .....passim

T.C.A. § 39-6-609(c) 13

18 U.S.C. § 371 32

18 U.S.C. § 1955 .....passim

18 U.S.C. § 1955(b)(1)(i) .....passim

28 U.S.C. § 1254 (1) 2

CITATION OF THE OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which has been recommended for full text publication, has been reproduced in the appendix, infra at 1a.

STATEMENT OF JURISDICTION

The judgment of conviction entered in the United States District Court for the Middle District of Tennessee was affirmed by the United States Court of Appeals for the Sixth Circuit on December 13, 1991. Jurisdiction for this Honorable Court is conferred by 28 U.S.C. § 1254 (1).

CITATION TO STATUTES AND CONSTITUTIONAL PROVISIONS

Although the Tennessee General Assembly legalized "commercial bingo"[1] in the early 1970's and although the Tennessee Attorney General's office at no time prosecuted a bingo game under that legislation, the office of the United States District Attorney for the Middle District of Tennessee indicted and convicted petitioner Virginia Hurst under 18 U.S.C. § 1955, which proscribes "illegal gambling businesses," for her management of a bingo hall. Because the prosecution largely relied upon admitted breaches of Tennessee civil regulations to satisfy the "violation of the law of the forum state" requirement of 18 U.S.C. § 1955, careful and immediate review of both the state and federal statutes involved is essential to ensure that the scope of the Organized Crime Control Act is not exceeded in derogation of Congressional intent, to safeguard the States' ability to define what constitutes criminal conduct under

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[1] Secretary v. St. Augustine Church, 766 S.W.2d 499, 500 (Tenn. 1989).

their own laws, and to protect petitioner's constitutional rights to a fair trial. However, on account of their length, the following authorities are printed in the appendix in their entirety: Tennessee Code Annotated § 39-6-609; 18 U.S.C. § 1955; and Article XI, Section 5 of the Tennessee Constitution.

STATEMENT OF THE CASE

THE LEGALIZATION OF BINGO IN TENNESSEE

Like several other state governments in recent years, the Tennessee General Assembly periodically has explored using state sanctioned lotteries as a means of generating revenue. However, because the Tennessee Constitution expressly prohibits lotteries in Tennessee,[2] no such program was adopted until 1972, when an innovative legislator drafted a statute which permitted the operation of bingo halls by non-profit corporations. This statute, which was enacted by the General Assembly in 1973 as T.C.A. § 39-6-609, ostensibly eluded the constitutional prohibition of lotteries by defining the monies used to play bingo as "charitable contribution(s) and not consideration."[3]

From the outset, Tennessee's bingo laws permitted a wide range of groups to

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[2]Tennessee Constitution Article XI, Section 5.

[3]See T.C.A. § 39-6-609(a)(1), infra at 46a.

operate bingo games. However, as bingo halls became more popular, the laws were liberalized. By 1986, virtually any group loosely structured as a non-profit entity was permitted to sponsor a bingo hall in Tennessee, including fraternal organizations, civic clubs, religious or charitable organizations, educational institutions, veterans groups, and labor organizations.[4]

As the Tennessee legislature relaxed the laws and encouraged the commercial bingo games it had legalized, it concomitantly made the most of its opportunity to use bingo to generate revenue. The legislature imposed licensing fees on groups conducting bingo games and taxed bingo supplies at a total rate of 22.75%.

In 1989, the Tennessee Supreme Court struck down Tennessee's bingo laws, finding that despite the legislature's attempts to define bingo wagers as "charitable contributions," the legislature had in fact legalized large scale "commercial bingo" in

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[4]See T.C.A. § 39-6-609(a)(1), infra at 45a-46a.

violation of the Tennessee Constitution. Though the Court expressed "no opinion . . . as to the desirability of the legalization of bingo or any other form of gambling," the Court held that "(u)nder the present constitutional provisions . . . the General Assembly (could) not authorize any form of lottery, directly or indirectly.[5]

THE PROVISIONS OF T.C.A. § 39-6-609 DURING THE TIME RELATIVE TO THIS CASE

The bingo game that was made the subject of the federal indictment in this case was operated on a periodic basis from September of 1986 until January of 1987 -- not only during the time when "commercial bingo" was legal in Tennessee but during the time when bingo games enjoyed their most liberal guidelines under Tennessee's bingo laws.[6]

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[5]766 S.W.2d at 502.

[6]In a last effort to save bingo, the Tennessee General Assembly adopted stricter regulations for bingo games in 1988, subsequent to the trial of Secretary v. St. Augustine Church but before that case came before the Tennessee Supreme Court.

The Dual Purposes of T.C.A. § 39-6-609

Placed as a section in the Part of Tennessee's criminal code dealing with gambling, § 39-6-609 was written to accomplish two purposes: (1) "to exempt the game of bingo from the general statutes against gambling"; and (2) "to regulate its conduct by a licensing system."[7]

The Exemption Provisions, § 39-6-609(a)

The portion of § 39-6-609 which addresses the exemption of bingo from Tennessee's gambling laws is subsection (a). Because § 39-6-609 was conceived as an attempt to legalize a form of gambling by writing around Tennessee's constitutional prohibition against lotteries, by its nature subsection (a) is beset with ambiguities.

The first paragraph of subsection (a), which contains the first condition for exemption from Tennessee's gambling laws, initially suggests a quasi-moralistic purpose for the authorization of bingo games by listing "religious or charitable organization(s)" as a groups permitted to

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[7]Secretary v. St. Augustine Church, 766 S.W.2d at 500.

play bingo. However, the same paragraph goes on to list virtually every other entity even loosely structured as a non-profit corporation as being eligible to conduct bingo games.

The second paragraph of subsection (a), which outlines the second condition for exemption, provides that no part of the receipts of the games are to enure to the benefit of "any private shareholder, member, or employee" of the organization conducting the games. But the paragraph then expressly, broadly permits the retention of "necessary and reasonable costs," "including constructing or maintaining a building to be used by the organization, salaries, and other expenses of conducting the (games)," provided that such costs do not exceed 25% of the games' gross receipts.[8]

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[8]The final exemption condition, contained in the final paragraph of subsection (a), provides simply that the proceeds of the games either must be used in Tennessee or must be used in an adjacent state for the benefit of a Tennessee resident.

T.C.A. § 39-6-609(b)-(i)

The remaining eight subsections of § 39-6-609 address the manner in which the bingo games legalized by subsection (a) were to be conducted and provides that the Secretary of State's office would monitor compliance with the regulations through a licensing system.

The many regulations set forth in subsections (b) through (g) included such detailed requirements as the following: prizes awarded in bingo halls were limited to an aggregate of $1,000 per game and $5,000 per day; bingo games were to be conducted only at an organization's domicile; bingo halls had to be open to inspection by the Secretary of State's office; bingo games were limited to operating three days per week and 150 days per year; persons conducting bingo games had to have been members of the organization for one year; advertising for bingo games was limited to a sign no more than 12 feet in diameter, one ad per month in the local newspaper, and the organization's own publications and mailing lists; and bingo supplies must have been

obtained from a licensed supplier and must have had official state markings.[9]

Organizations wanting to conduct bingo games sent in applications, which, by the terms of subsection (c), were reviewed by several officials and, ultimately, by the Secretary of State. When an application was approved, the Secretary of State's office issued a bingo permit for the organization.

In addition to monitoring compliance with licensing requirements, the Secretary of State's office was given the responsibility of monitoring bingo games' compliance with the civil regulations set out in § 39-6-609(b)-(g). Pursuant to subsections (h) and (i), any person or organization failing to comply with a regulation could be made to attend an administrative hearing and face the suspension or revocation of their bingo operation by the Secretary of State's office.

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[9] See T.C.A. § 39-6-609(b), infra at 48a-55a. Further regulations are contained in subsections (c) through (i). See infra at 55a-60a.

TENNESSEE'S ENFORCEMENT OF BINGO REGULATIONS

Compliance with the various bingo regulations was monitored by the Charitable Solicitations Division of the Secretary of State's Office. Compliance officers would periodically visit the bingo games themselves and observe the conduct of the games, while officials in Nashville would issue and collect worker application forms for those conducting the games.

In 1986 and before, the Secretary of State's Office was lax in its enforcement of the bingo regulations. During that period, the Secretary of State's Office did not attempt to review the information supplied on the workers' forms, simply taking them at face value. In fact, it appears that in many cases, the employees in the office did not even read the forms. The compliance officers attending the games appeared little interested in who was working for what organization, giving no significance to several workers' practice of working for more than one organization out of the same building. The impression was certainly given to those conducting the bingo games that the workers' forms and the civil regulations governing workers were

unimportant technicalities -- formalities with which the Secretary of State's office wasn't concerned.

Irrespective of the casual approach that the Secretary of State's Office took to bingo in the mid-1980's, even if a compliance officer or an official in Nashville did become concerned with an apparent violation of a bingo regulation -- such as that a worker's permit didn't have the right date or number, length of membership and so forth -- then he or she would simply refer the matter to the Administrative Procedures Division for a formal hearing before an administrative law judge.[10] Unless an organization's permit to conduct bingo was suspended or revoked through that administrative hearing process, the organization's permit, once issued, was valid for one year.[11] This type of administrative remedy, subject to enforcement by the injunction and contempt

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[10]T.C.A. § 39-6-609(h),(i).

[11]T.C.A. §39-6-609(c).

powers of Tennessee's Chancery Courts, was the exclusive remedy for such violations.[12]

MRS. VIRGINIA RUTH HURST

Four years out of high school, Virginia Ruth Hurst left her hometown of Murphy, North Carolina and moved to Knoxville, Tennessee, where she ultimately met and married Bill Hurst and where she now resides with Bill and their four children.

Mrs. Hurst became acquainted with the game of bingo in Knoxville in the late seventies. Finding that she enjoyed playing bingo and getting to know others who enjoyed the game, she began to play it regularly and soon began helping out with one of the games in Knoxville.

In 1982, the Eastern Band of Cherokee Indians began their large scale, "million dollar" bingo games on their reservation in Cherokee, North Carolina. Because Tennessee had just begun limiting the amounts of prizes that bingo games could award in a single night to $5,000.00, the Cherokee game became quite a draw for

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[12]See discussion of the enforcement of T.C.A. § 39-6-609, infra at 29-31.

Tennessee bingo players, as well as others from all parts of the country.

While attempting to organize transportation to one of the Cherokee games for herself and some of her friends shortly after the Cherokees game opened, Mrs. Hurst learned that the management of the Cherokee game paid $1,000.00 plus expenses for every bus load of players that tour coordinators organized to attend. Having had some familiarity with the transportation business from running a taxi company with her husband in the 1970's, Mrs. Hurst began coordinating bus trips from Knoxville to the Cherokee game.

In a matter of weeks, Mrs. Hurst discovered that she had happened upon a new career for herself. She was organizing up to six buses of players for each Cherokee game and was also selling admission tickets to the games themselves, receiving a forty percent commission for each ticket sold. In a short time, she became the top tour bus coordinator with Cherokee and was selling $250,000 in tickets per year.

Mrs. Hurst's success with her Cherokee bus tours and ticket sales was in large part due to her efforts on behalf of bingo

games in East Tennessee. On account of her extensive exposure to the conduct of bingo games over a period of several years, Mrs. Hurst had been approached by several Knoxville non-profit organizations and asked to conduct bingo games on their behalf.

Between 1983 and 1989, Mrs. Hurst conducted bingo games for groups such as the Knoxville Communications Cooperative (a non-profit radio station), the E. M. Jellinek Center (providing housing and treatment for chemically dependent men), and Knoxville Golden Gloves (a physical training center for boys). Although Mrs. Hurst was never paid for her efforts on behalf of these organizations, she had an understanding with them that she would be able to advertise her Cherokee trips at the organizations' games and that the organizations would buy Cherokee tickets from her to be used as some of the prizes in their games. As it turned out, it was the players who attended these games that were the best source of customers for her Cherokee tours and tickets. Additionally, she was able to hold the bingo games in the building that she had leased for her

Cherokee tour business, thereby defraying some of her leasing and operating expenses.

The fact that helping the Knoxville charities seemed to help her busing career at the same time took nothing away from the respect and admiration she engendered from the charities. Through the efforts of Mrs. Hurst, the E. M. Jellinek Center was able to expand from two homes to seven. Further, Mrs. Hurst's work for the charities often went above and beyond the bingo games. As Frank Kolinsky, director of the E. M. Jellinek Center, noted, she on several occasions brought in canned food and clothing and held bake sales for the center.

THE PUBLIC SIDE OF JAMES V. LONG

Publicly, "Jim" Long was a powerful, influential, popular man in the State Legislature in the mid-1980's who was devoting much of his energies to lobbying to protect the legal status of bingo games in Tennessee. He contributed heavily to a variety of legislators and had formed a political action committee aimed specifically at broadening bingo legislation. He gave some thirty to thirty-two thousand dollars to Ned

McWherter's gubernatorial campaign and was "in" enough to have dined with the governor-to-be at an exclusive Nashville restaurant.

In addition to working as a bingo lobbyist, Jim Long put together the Liberty Corporation and Volunteer Distributing, companies which packaged and distributed bingo supplies. In part due to his lobbying efforts, these businesses enjoyed a near monopoly in Tennessee.

A next door neighbor and close friend of Jim Long during the mid-1980's was W. D. "Donnie" Walker, who was coincidentally the Chief Compliance Officer in the Charitable Solicitations Division of the Secretary of State's Office. Jim Long would at times accompany Donnie Walker to the various bingo halls to further his outward appearance as an established, influential political figure.

Jim Long funded his bingo political action committee through dues requested of the different organization's bingo games. The lobbying group held meetings about once a month. Mr. Long told the legislators to whom he gave money that he was representing the bingo industry.

Virginia Hurst knew Jim Long as this active man of influence in politics who was working to protect the legality of bingo. She contributed, on the average, three hundred dollars per month to his political action committee. She also purchased bingo supplies from him for the bingo games she conducted.

Although Mrs. Hurst knew that in one sense her Cherokee business would be helped if Mr. Long's lobbying efforts failed and bingo was prohibited in Tennessee, as players would have to play out of state, she knew that bingo was a great benefit to the non-profit organizations she helped and knew, as well, that a large part of her Cherokee tour bus business depended on contacts she was able to make at the Knoxville bingo games. Accordingly, she had no reservations about contributing to Mr. Long's lobbying efforts.

THE PRIVATE SIDE OF JAMES V. LONG

Unbeknownst to all but a few, the mid-1980's were a time of fraud and deception for Jim Long.

In the shadows of his activities as a lobbyist, Mr. Long lied under oath on all of the financial disclosure forms that

state law required him to file regarding his many contributions to various legislators.

Mr. Long's record keeping for his apparently legitimate business was fraudulent; he admitted failing to file taxes on much of his income and consequently destroying many of his records after receiving an IRS subpoena for them.

Further, Mr. Long, along with a few others, set up "storefront" bingo halls in Chattanooga and in Memphis, whereby all of the proceeds of the games were intended to go directly to the individuals organizing the game, as opposed to the non-profit organization under whose name the games were being played.

During the FBI's investigation into his affairs, although he gave the appearance of candor, he later had to admit that some of his statements to the agents were lies.

THE OPERATION AND MANAGEMENT OF BINGO GAMES

Although the bingo games operated by Mrs. Hurst in Knoxville were successful, other bingo games sometimes lost money. For example, the "storefront" game that Jim Long tried to operate in Chattanooga lost

over $40,000.00 in just four or five months. Bingo games were generally expensive to start and difficult to keep going. The equipment necessary at the outset -- tables, chairs, bingo machines, bingo supplies, etc. -- cost thousands of dollars. Operating expenses ran into the thousands of dollars as well, as a building normally had to be leased or purchased; maintenance, janitorial and security personnel had to be hired; workers' salaries had to be paid; insurance had to be procured; advertising had to be done; prizes had to be purchased; and any debt incurred for start up expenses had to be serviced. Further, most of the money taken in had to be paid back out to the players as prizes in order to maintain the players' interest in the game. In Knoxville, for example, about 80% to 90% of the money taken in at successful bingo games was paid out to the players in prizes.

Certainly Jim Long was aware that Mrs. Hurst knew how to run a bingo game successfully. He was aware that she was operating games on behalf of the Knoxville Communications Cooperative, the E. M. Jellinek Center, and the Knoxville Golden

Gloves Organization. He was also aware of her successful involvement with the Cherokee game.

MRS. HURST'S ASSISTANCE WITH THE BINGO GAME FOR THE COLUMBIA SCHOLARSHIP FUND IN CROSSVILLE, TENNESSEE

Through her work with the E.M. Jellinek, Knoxville Communications Cooperative, and Golden Gloves bingo games, Mrs. Hurst got to know several people from the Crossville, Tennessee area who traveled some seventy miles east to Knoxville to play. At their insistence, Mrs. Hurst looked into the possibility of opening a third game for E. M. Jellinek in the Crossville area so they wouldn't have to drive as far to play.[13]

Subsequently, when ordering bingo supplies from Jim Long, Mrs. Hurst mentioned to Mr. Long the possibility of E. M. Jellinek opening up a game in Crossville. About two weeks later, Mr. Long called her back and told her that he

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[13]Organizations such as the E. M. Jellinek center were permitted by statute to conduct bingo games in up to three different locations. T.C.A. § 39-6-609(b)(5).

understood that E. M. Jellinek would not be able to put a game in Crossville, because organizations allowed to have three games had to have all three in the same district (east, middle or west) of the state.

Sometime later, Mr. Long contacted Mrs. Hurst again and told her that he knew of a tax-exempt organization that was interested in having a bingo game in the Crossville area and that had the necessary qualifications. When Mrs. Hurst questioned him about the organization's ability to advance the start-up expenses for the bingo game, the conversation ended. Mr. Long called her back two or three weeks later, told her that the start-up expenses had been worked out and asked her to come down to Nashville to meet State Representative Tommy Burnett to explain to him how a bingo game was operated.

Mrs. Hurst had no reason to question Mr. Long's assurances as to the organization's legitimacy. To her, Mr. Long was simply a businessman with a bingo supply company and an influential political figure with impressive friends who was devoting great energies to help the bingo industry in Tennessee.

In the fall of 1985, Mrs. Hurst drove to Nashville with Allen Cox, who had worked with her at one of her bingo halls, and with Eddie White, who was a long time friend of Mrs. Hurst and her husband's, and was taken by Jim Long to meet Rep. Tommy Burnett. In Mr. Burnett's office, Mrs. Hurst was told that the start-up expenses for the game in Crossville would be taken care of by clients of Representative Burnett's. She, then, agreed to locate the necessary equipment, get the building ready (when one was located), and help conduct the game. Just as with the organizations she worked with in Knoxville, she made it understood that she would sell her Cherokee bingo tickets to the public and would sell the organization Cherokee tickets to be given away as prizes.

Rep. Burnett testified that during the meeting, he agreed that his clients would advance the necessary start-up money for the game, so long as they would be paid reasonable financing charge for the advance, as authorized under the "reasonable and necessary costs (of operation)" provision of T.C.A. § 39-6-

609(a)(2). Mrs. Hurst testified that such was her understanding as well. As for her, Mrs. Hurst made it clear to Mr. Long and Rep. Burnett that in operating the game, she would be entitled to sell the organization Cherokee tickets with 40% of the "gross net."[14] Certainly Mrs. Hurst understood that one could not take away proceeds of the games that were to go to the particular charity. Further, as the success of her Cherokee business was tied to the success of the bingo games she conducted, she had no interest in doing so.

Mr. Long testified that he, Rep. Burnett, and Mrs. Hurst discussed dividing the profits of the game among themselves at the meeting. Testifying pursuant to an agreement with the prosecution,[15] he went to great lengths to

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[14]Mrs. Hurst in fact never sold the Columbia Scholarship Fund any Cherokee tickets, as the game was not well attended and lost money.

[15]Mr. Long's agreement covered four federal districts and one state jurisdiction in which he had been indicted or was being investigated. See discussion, infra at 49, n. 21.

attempt to inculpate the other defendants, at one point going so far as to suggest that no individual could profit from a bingo game. However, he admitted on cross-examination that under the broadly worded statute (that he, as a lobbyist, helped pass), many persons could profit legally from bingo games, including those selling bingo supplies, those who leased their property to be used as bingo halls, utility companies, maintenance personnel, those persons selling whatever prizes were given away (including Cherokee tickets), lending institutions which provided start-up money, and persons paid "salaries and other expenses of conducting the activities permitted" under Tennessee's bingo statute.[16]

Mr. Long called Mrs. Hurst some time later and told her that the building that

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[16]Mr. Long likewise admitted that he had no part in the Columbia Scholarship Fund's organization, activation, structure or qualification for tax-exempt status. Further, he could not deny that Mr. E. E. Shutt, the president of the Columbia Scholarship Fund, never told him that the proceeds of the game would be used for anything other than charitable purposes.

was to be used was on Genesis Road and asked her to go by and see what she thought. She visited the building and found it to be one that was too large and too difficult to heat. Nonetheless, Mr. Long asked her to go ahead and execute a lease for the building with an option to purchase clause.

Mrs. Hurst, with the guidance of an attorney, then executed a lease for the building through a realtor named Howard Hulig. Mrs. Hurst then made the necessary preparations for getting the bingo hall ready, which of course were familiar to her. She purchased tables and chairs, she hired a local carpenter to make some minor changes in the building, she contacted some friends of her to help her, and she engaged security personnel from the local police force. At one point, when she realized that the carpenter's bills had not been paid, she even deposited some of her own money into the Columbia Scholarship account.[17]

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[17]The prosecution made much of the fact that portions of the money Mrs. Hurst deposited into the Columbia Scholarship

(continued...)

The bingo game for the Columbia Scholarship Fund began operating in September of 1986. However, low turnout and difficulties heating the building doomed the game from the outset. The hall operated a total of just 35 days from September of 1986 through its closing in January of 1987. By the time it closed, it had lost thousands of dollars. The last time Mrs. Hurst visited the hall was in December of 1986. She returned to Knoxville to devote all of her energies to the organizations for whom she worked there. She continued to operate the E.M. Jellinek Center's bingo games until bingo was declared unconstitutional by the Tennessee Supreme Court in 1989.

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[17](...continued)
account consisted of checks cashed at Mrs. Hurst's bingo games in Knoxville. However, the government's own witnesses testified that Mrs. Hurst took money in at the Knoxville bingo halls both for bingo game cards and for her Cherokee tickets. The government's implication that Mrs. Hurst was taking the Knoxville charity's money and putting it in the Columbia Scholarship Fund's account was grossly misleading, as Mrs. Hurst simply had cashed out those checks from Cherokee ticket money in order to send them to Crossville.

THE STATE OF TENNESSEE'S APPROVAL OF THE COLUMBIA SCHOLARSHIP FUND BINGO GAME

No one from the Attorney General's office of the State of Tennessee ever prosecuted or investigated the Columbia Scholarship Fund bingo game as being any violation of any criminal law (or any civil law) of the state. John Roberts, the District Attorney General for the Thirteenth Judicial District of Tennessee, which includes the county in which the game was located, never had any complaints about the Columbia Scholarship Fund game. General Roberts testified that if the Secretary of State's office had brought any matter to his attention regarding the Columbia Scholarship Fund bingo game, he certainly would have addressed it. But he received no such information from the Secretary of State's office about the game.

General Roberts was not aware of anyone investigating bingo in Tennessee during that time. Further, even after bingo was declared unconstitutional in Tennessee in 1989, the only action that his office took with regard to a bingo game that continued to operate was to close it down -- no criminal charges were pursued.

Two officers with the Crossville Police Department served as security guards for the Crossville bingo game. Both officers testified that they got permission from their supervisor, the chief of police in Crossville, to work at the bingo hall. They acknowledged that they certainly would not have worked at the bingo hall had they thought that the game was illegal in any fashion.

The state agency given the authority to regulate bingo games, the Secretary of State's Office, likewise approved of and had no problems with the Columbia Scholarship Fund bingo game. The Columbia Scholarship Fund was granted a bingo permit on September 19, 1986, after the following officials in the Secretary of States office approved its issuance: Art Beasley, director of charitable solicitations; W. D. Walker, Chief Compliance Officer; James Simmons, Executive Assistant to the Secretary of State; and Secretary of State Gentry Crowell.

Compliance officers visited the Columbia Scholarship Fund game from time to time, but the organization was never cited

for a violation and was never made to attend any type of administrative hearing.

Significantly, the Tennessee Attorney General's Office, obviously familiar with the breadth of the Tennessee Legislature's legalization of bingo, never prosecuted a single bingo game. The only instances where organizations conducting bingo games were involved in court proceedings over bingo games occurred where the civil findings of the Administrative Law Section of Tennessee's Secretary of State's office were reviewed by Tennessee's Chancery Courts.

Nonetheless, on November 15, 1989 Mrs. Virginia Hurst found herself indicted in the United States District Court for the Middle District of Tennessee for conspiring to conduct and conducting an illegal gambling business as proscribed by 18 U.S.C. § 1955 for her management of the Columbia Scholarship Fund bingo game.

THE PROCEEDINGS BELOW

State Representative Sam Thomas Burnett, James V. Long, and Eddie E. Shutt were named with Mrs. Hurst in the indictment.

Count one of the indictment charged the other defendants and Mrs. Hurst with conspiring to operate an illegal gambling business in violation of 18 U.S.C. §§ 371 and 1955.

Count two charged the other defendants and Mrs. Hurst with conducting or aiding and abetting the conduct of an illegal gambling business in violation of 18 U.S.C. §§ 1955 and 2.

Counts three through nine set forth allegations of fraud by Representative Burnette and Jim Long which were unrelated to Mrs. Hurst.

Significantly, the bulk of the indictment and the bulk of the federal government's case in chief as it related to Mrs. Hurst alleged and relied upon breaches of **civil regulations** contained in § 39-6-609 -- which Mrs. Hurst did not contest -- to prove that Mrs. Hurst had engaged in **criminal** conduct under Tennessee law.

This cause went to trial before a jury in the United States District Court for the Middle District of Tennessee on June 18, 1990. At the conclusion of the trial on July 6, 1990, the jury found each defendant guilty on all counts charged.

The convictions were affirmed by the United States Court of Appeals for the Sixth Circuit on December 13, 1991.

The sentence imposed on Mrs. Hurst by the trial court was two years probation and a fine. Although Mrs. Hurst's period of probation will no doubt have expired by the time this Honorable Court considers this petition, Mrs. Hurst vigorously pursues this appeal to safeguard her constitutional right to a fair trial, to ensure that the scope of the Organized Crime Control Act is not exceeded in derogation of Congressional intent, and to protect the States' ability to define what does and does not constitute criminal conduct under their own laws.

ARGUMENT

I. THE UNITED STATES ATTORNEY GENERAL'S OFFICE MAY NOT PROSECUTE BREACHES OF CIVIL, REGULATORY PROVISIONS OF THE TENNESSEE CODE AS CRIMINAL CONDUCT UNDER 18 U.S.C. § 1955 OF THE ORGANIZED CRIME CONTROL ACT.

A. 18 U.S.C. § 1955(b)(1)(i) Requires the Federal Government to Establish that the Targeted "Business" is a Criminally Proscribed Gambling Business in the Forum State.

The first essential element of 18 U.S.C. § 1955, which proscribes "illegal gambling businesses," requires the prosecution to establish that the subject gambling business "is a violation of the law of a State or political subdivision in which it is conducted." §1955(b)(1)(i).

1. Step One in the Analysis: Whether the Targeted Business Violates the Criminal Laws of the Forum State.

It is axiomatic that the "violation of the law of the (forum state)" requirement of § 1955 requires the federal government to establish that the targeted business constitutes criminally proscribed gambling in the forum state. See 21 A.L.R. Fed. 703.

Addressing the constitutionality of § 1955 in United States v. Aquino, 336 F.Supp. 737,740 (E.D.Mich.1972), 21 A.L.R. Fed. 703, 706, aff'd 500 F.2d 1403, the court stated: "It is a well established principle that Congress may incorporate by reference state criminal laws in federal criminal statutes." (Emphasis added).

Bootstrapping a state civil law violation into a federal criminal offense would be in direct conflict with the very foundation of § 1955. A state legislature's decision to legalize and regulate an activity would be overridden by the all encompassing federal definition of gambling in § 1955 (b)(2) were a broader construction of §1955 (b)(1)(i) assumed.

Accordingly, in United States v. Gordon, 464 F.2d 357 (9th Cir. 1972), where the federal government attempted to rely upon Nevada Gaming Commission regulations, the violation of which could lead to only civil sanctions, to satisfy the "business which is a violation of the law (of the forum state)" requirement of § 1955 (b)(1)(i), the Court affirmed the trial court's dismissal of the indictment.

2. Step Two in the Analysis: Whether the Targeted Business Constitutes Illegal Gambling in the Forum State.

It is likewise axiomatic that "only if a state anti-gambling law is violated is there criminal liability under the federal statute." United States v. Chiarizio, 525 F.2d 289, 294 (2d Cir. 1975). The federal government is not able to rely upon the targeted business' breach of a state statute that does not determine whether a particular business is or isn't gambling in order to establish the first element of § 1955. For example, the federal government could not attempt to satisfy the "violation of the law of the (forum state)" requirement of § 1955 by showing that the targeted business violated a state fire code regulation. Although the business would be "in violation of state law" by breaching the state's fire code, the business would not be considered gambling by such a violation. Rather, the federal government must prove that the targeted business itself is illegal gambling under state law before it may prosecute the

targeted business as an "illegal gambling business" under federal law.

Accordingly, in United States v. Berent, 523 F.2d 1360 (9th Cir. 1975), where the indictment relied upon a defendant's purported violation of a Nevada statute proscribing certain types of gambling activities without a license, but the Court found that the statute cited by the government was not determinative of whether the targeted business was a proscribed gambling business under Nevada law, the Court affirmed the trial court's dismissal of the indictment.

Any other interpretation of the "business which is a violation of the law of (the forum state)" requirement of § 1955 would illogically permit the federal government to prosecute a business as an "illegal gambling business" under federal law without having to prove that the targeted business constituted illegal gambling in the forum state. Were that the case, a citizen could no longer rely upon his own state government's legalization of gambling and engage in what he understands to be a legal gambling business without fear of ultimate federal prosecution.

Congress, then, would have effectively removed from state legislatures the power to legalize gambling in any form that was inconsistent with the definition of "gambling" in 18 U.S.C. § 1955 (b)(2). Such was not the purpose of the enactment of § 1955. See United States v. Bridges, 493 F.2d 918, (5th Cir. 1974); United States v. Farris, 624 F.2d 890 (9th Cir. 1980).

Indeed, it is because the cornerstone of § 1955 is the principle that a business must violate the forum state's anti-gambling laws before it may be vaulted to the level of a federal offense that § 1955 has been able to withstand constitutional attacks on several separate bases. For example, in United States v. Hawes, 529 F.2d 472 (5th Cir. 1976), the Court held that § 1955 does not operate to deny citizens equal protection under the law as guaranteed by the Fifth Amendment because § 1955 incorporates the laws of the states. "If gambling is legal in a state," the Court observed, "there is no crime in the gambling activity and thus no organized crime to control." 529 F.2d at 478 (emphasis added). Similarly, in United

States v. Chiarizio, 388 F.Supp. 858 (D.C. Conn. 1975), aff'd 525 F.2d 289 (2d Cir. 1975), the Court found that because § 1955 had incorporated the violation of state gambling laws as an element of the offense, Congress had not unconstitutionally exceeded its power under the commerce clause. The Court further noted that on account of the dependence of § 1955 upon a violation of the forum state's anti-gambling laws, § 1955 was not unconstitutionally vague.

B. Both the Indictment and the Instructions to the Jury in this Case Impermissibly Expand the Scope of 18 U.S.C. § 1955 by Relying Upon Breaches of Civil Regulations in the Tennessee Code Which Are Not Determinative of the Legality of Gambling in Tennessee to Satisfy the "Violation of the Law of the (Forum State)" Requirement of § 1955 (b)(1)(i).

1. Subsections (b) through (i) of T.C.A. § 39-6-609 Are Civil Regulations Enforced by Civil Sanctions.

As discussed at length in the Statement of the Case at 10-14, subsections (b) through (i) of § 39-6-609 address the conduct of bingo games and provide for their monitoring through a licensing system

set up through the Secretary of State's office. The many regulations contained therein, which specify rules ranging from membership requirements to advertising requirements, were enforceable through an administrative hearing process authorized through the Secretary of State's office--not through Tennessee's criminal courts. If necessary, the findings of the administrative law judge were reviewed and enforced by Tennessee's Chancery Courts.[18]

2. Subsections (b) through (i) of T.C.A. § 39-6-609 Do Not Address Whether Bingo Games Constituted Illegal Gambling Under Tennessee Law.

Given the breadth of Tennessee's authorization of commercial bingo and the inherent ambiguity in the exemption conditions set forth in § 39-6-609(a), it is unclear whether the game of bingo could have been considered illegal gambling in Tennessee under any circumstances during the time period of the subject allegations

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[18]Indeed, the only penal provision in the entirety of § 39-6-609 renders a violation of the second exemption condition in § 609 (a), concerning expenditure of receipts, a misdemeanor.

against Mrs. Hurst.[19] But if an argument is to be made that bingo games were not intended to have been removed entirely from Tennessee's general proscription of gambling under Tennessee Code Chapter 39, Part Six, then the express terms of § 39-6-609(a) confine that argument to bingo games which fail to satisfy the exemption conditions set forth in that subsection. Subsection (a) contains the only conditions for exemption in all of § 39-6-609, and several of the latter subsections, which concern the conduct of the bingo games themselves, make express reference to the "exemptions" provided in subsection (a).[20]

Certainly the courts look to the clear language of a statute to carry out its legislative purpose, Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. 1981); the language of a statute controls when sufficiently clear, Ernest and Ernest

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[19]This issue is discussed at length, infra at 51-53.

[20]See subsections (c) and (d) of § 39-6-609.

v. Hochfelder, 425 U.S. 185, S. Ct. 1375, 47 L. Ed. 2d 668 (1976).

As noted above, subsections (b) through (i) of § 39-6-609 contain regulations addressing how the bingo games were to be conducted and the scope of the authority of the Secretary of State's Office to enforce those regulations. A particular bingo game's compliance with these regulations determined not whether the game of bingo was or was not proscribed gambling under Tennessee law, but simply whether the particular bingo game was or was not subject to losing its license to operate issued by the Secretary of State's Office. If one were to disregard the express language, purposes, and structure of § 39-6-609 and treat each regulation as a separate condition for exempting a particular bingo game from Tennessee's gambling laws, it would lead to absurd results. For example, an otherwise permissible bingo game would suddenly become gambling merely by a 15 year old's presence on the premises in violation of subsection (f); by a person's assistance in conducting the game where the person was not a member of the sponsoring organization

in violation of subsection (b)(7); by the organization's failure to display their license in a conspicuous place in violation of subsection (d)(1); and by the organization's use of a sign greater than twelve feet in diameter in violation of subsection (b)(8). Clearly, these regulations do not determine whether a bingo game constitutes criminally proscribed gambling, but rather whether a presumably exempt bingo game is conducting itself within the specific regulatory guidelines monitored by the Secretary of State's Office.

3. Both the Indictment and the Trial Court's Instructions to the Jury Are Fatally Flawed by Their Reliance Upon Portions of Subsections (b) through (i) of § 39-6-609 to Establish that the Subject Bingo Game Was Illegal Gambling Under Tennessee Law.

Both the indictment and the trial court's instructions to the jury relied extensively upon purported breaches of several of the regulations governing the conduct of bingo games contained in subsections (b) through (i) of T.C.A. § 39-6-609 to establish the violation of the law

of (the forum state)" requirement of § 1955.

THE INDICTMENT

At the end of the second paragraph in count one, the government paraphrases the first sentence of § 39-6-609(b): "[t]he conduct of bingo games was to be strictly enforced according to the requirements set forth in T.C.A. § 39-6-609 which among other things . . . ." Indictment at 2. The following eight paragraphs proceed to paraphrase most of the regulations contained in subsections (b) through (i) of § 39-6-609. Indictment at 2-4. The majority of the remaining ten pages of count one consists of allegations as to how the various defendants failed to comply with the various regulations contained in subsections (b) through (i). Indictment at 6-15. Count two incorporates count one's reliance upon the subsection (b) through (i) regulations by reference to § 39-6-609 in its entirety. Indictment at 16.

Having pled the various regulations contained in the subsections (b) through (i), the government expressly relies upon those regulations to satisfy the "business

which is a violation of the laws of (the forum state)" requirement of 18 U.S.C. § 1955. Indictment at 5, 16. Significantly, the government paraphrases § 1955 (b)(1)(i) in both counts one and two to require merely that the government establish that the business was "in violation of the laws of (Tennessee)," Indictment at 5, 16, as opposed to a "business which is a violation of the laws of (Tennessee)." 18 U.S.C. § 1955 (b)(1)(i).

Though such paraphrasing is of little consequence where there is no question that the targeted business is illegal gambling in the forum state, such an oversimplification is misleading where there is a dispute as to whether the subject business constitutes gambling in the forum state. Further, the oversimplified paraphrasing of § 1955 (b)(1)(i) implies that the government need only show the violation of some state law instead of the violation of state anti-gambling laws.

THE GOVERNMENT'S CASE-IN-CHIEF

The weight of the evidence that the government introduced against Mrs. Hurst

during the course of the trial below was offered to establish that Mrs. Hurst had violated several of the subsection (b) through (i) regulations pled in its indictment. In fact, twelve witnesses were called against Mrs. Hurst to establish that Mrs. Hurst had asked them to help her conduct the subject bingo games even though they were not members of the Columbia Scholarship Fund Organization, in violation of subsection (b)(7).

Thus, in both its indictment and its case-in-chief, the government appeared to be confusing the organization's eligibility for a license from the Secretary of State's Office under the regulations contained in subsections (b) through (i) of § 39-6-609 with the organization's eligibility for exemption from Tennessee's gambling laws under § 39-6-609(a).

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY

The trial court's instructions to the jury likewise mistakenly cite subsections (b) through (i) of § 39-6-609 as addressing the issue of whether the subject bingo game was illegal gambling in Tennessee.

Further, the trial court also

paraphrased and oversimplified the language of § 1955 (b)(1)(i):

> If you find beyond a reasonable doubt, that the defendants or any of them, were operating a bingo game in violation of the provisions of Tennessee Code Annotated 39-6-609, then that bingo game was in violation of the law of a state within the meaning of title 18 U.S.C. § 1955.

TR. XV at 88 (Emphasis added).

Because the indictment and the trial court's instructions to the jury enabled the jury to find that the subject bingo game was an illegal gambling business under Tennessee law based upon violations of statutes which were civil in nature and which in fact did not even determine whether a particular bingo game constituted illegal gambling under Tennessee law, the first essential element of both offenses charged against Mrs. Hurst was not properly determined. Mrs. Hurst was tried and convicted of operating an illegal gambling business in violation of federal law at least in part -- if not exclusively -- because of her violation of a few bingo regulations which she did not contest and which the State of Tennessee had never been concerned about. In fact, given the

credibility problems of the government's main witness, Jim Long, and given that the subject bingo game's violations of the subsection (b) through (h) regulations were largely admitted, it more probable than possible that the jury incorrectly found the subject bingo game to be an "illegal gambling business" under § 1955 based upon the game's purported violations of the subsection (b) through (h) regulations.[21] But in either case, the indictment and the trial court's instructions to the jury contain positive misstatements of the law which impermissibly expand the scope of 18

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[21]Mr. Long's personal tendencies towards deception (see pp. 19-20 supra), found no reason to suppress themselves in the trial court below. Before the trial of this cause, Jim Long made a deal with the government whereby he agreed to testify against the other defendants in this case in exchange for a cap of ten years on the lifetime of exposure he faced in four separate federal districts in Tennessee and South Carolina and in one state court in Tennessee. On the witness stand, he admitted that he was fearful of the government and what the government could do to him. Indeed, Mr. Long had so many charges pending against him that he could not even recall what the charges were to which he had plead guilty in the Western District of Tennessee.

U.S.C. § 1955. Accordingly, this issue merits consideration by this Honorable Court.

II. THE CONFLICT IN AUTHORITY BETWEEN THE SIXTH AND NINTH CIRCUITS REGARDING THE NECESSITY OF UNDERGOING A CIVIL, REGULATORY / CRIMINAL, PROHIBITORY ANALYSIS OF A STATE STATUTE TO DETERMINE WHETHER THE STATUTE'S VIOLATION MAY SATISFY THE "VIOLATION OF THE LAW OF THE FORUM STATE" REQUIREMENT OF 18 U.S.C. § 1955 OF THE ORGANIZED CRIME CONTROL ACT SHOULD BE RESOLVED IN FAVOR OF THE PETITIONER.

As previously discussed, only businesses which are criminally proscribed gambling businesses under the laws of the forum state are subject being prosecuted by the federal government under § 1955. Any other construction of § 1955 would effectively prohibit the states from removing certain gambling activities from the bounds of their criminal laws, as the states' citizens would remain criminally liable under the all encompassing federal definition of gambling in § 1955 (b)(2). Broadening the application of § 1955 in such fashion would be contrary to Congressional intent, contrary to the

federal courts' interpretation of § 1955, and contrary to common sense.

A. At All Times Relative to the Indictment, the Operation of a Bingo Hall Was a Civilly Regulated, Not a Criminally Prohibited Activity in Tennessee.

1. THE EXPRESS LANGUAGE AND STATUTORY SCHEME OF § 39-6-609

As discussed previously, Tennessee's bingo statute was conceived in an effort to elude Tennessee's constitutional prohibition against lotteries. Thus, by its nature as well as its terms, T.C.A. § 39-6-609 was beset with ambiguities.

By the express terms of § 39-6-609(a), bingo games which fall within the terms of the three exemption conditions set forth therein are exempt from Tennessee's general proscription of gambling in Part Six of Chapter 39. However, because there is no express penalty provided in § 39-6-609(a) for failing to comply with the exemption conditions, it is ambiguous whether the Tennessee legislature intended non-complying bingo games to be subject to Tennessee's criminal gambling penalties or simply to be subject to being denied a bingo license by the Secretary of State's

Office and, ultimately, subject to the injunction powers of Tennessee's Chancery Courts.

Aside from the fact that Tennessee public policy and Tennessee's application of § 39-6-609 favor the latter construction, the very ambiguity inherent in subsection (a) mandates that the latter interpretation be applied in this case. It is well established that where there is ambiguity in a statute, doubts are resolved in favor of the defendant. United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

2. TENNESSEE PUBLIC POLICY AND THE STATE'S APPLICATION OF T.C.A. § 39-6-609

Certainly Tennessee public policy and Tennessee's application of § 39-6-609 favor a liberal interpretation of the language of subsection (a). By the very breadth of the statute, the Tennessee Supreme Court noted that the legislature had undertaken to legalize full scale "commercial bingo." Secretary v. St. Augustine Church, 766 S.W.2d 499, 500 (Tenn.1989).

Further, the Tennessee General Assembly gave the Secretary of State's

Office the authority to license and monitor the bingo games and provided for an administrative hearing process as the exclusive remedy for enforcing violations of the regulations in § 609. There never was a criminal prosecution of a bingo game in Tennessee during the decade and a half that bingo was removed from Tennessee's gambling laws. In fact, the government's own proof below showed that where one bingo game continued to operate after the Tennessee Supreme Court declared bingo to be unconstitutional, the game was simply closed down, not criminally prosecuted, by the district attorney general.

B. The Split of Authority Between the Sixth and the Ninth Circuits Regarding the Necessity of Undergoing a Civil, Regulatory / Criminal, Prohibitory Analysis of the Law of the Forum State in Prosecutions Under 18 U.S.C. § 1955 Should Be Resolved in Favor of Petitioner.

The ambiguities inherent in subsection (a) of T.C.A. §39-6-609 lend themselves to the civil, regulatory / criminal prohibitory analysis adopted by the Ninth Circuit and several other courts to determine whether the subject bingo game

was properly vaulted into a federal prosecution under § 1955.[22]

The "civil / regulatory test" has been applied in certain § 1955 cases where courts have examined state gambling statutes and found them to have both civil and criminal elements. These courts have attempted to determine whether the particular state statutes were generally more criminal or civil in nature, holding that § 1955 is inapplicable to prosecutions relying upon state statutes which are basically civil in nature.[23]

The Sixth Circuit has rejected such a balancing analysis in United States v. Dakota, 796 F.2d 186 (1986). However, the

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[22]Petitioner notes that such an analysis is not necessary with regard to the regulations contained in subsections (b) through (i) of §39-6-609, which are clearly civil in nature.

[23]See, e.g., United States v. Farris, 624 F.2d 890 (9th Cir. 1980); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982); and Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (W.D. Wis. 1981).

Dakota case involved an indian reservation's operation of casino gambling which clearly was prohibited conduct in the forum state of Michigan. Accordingly, no such balancing of the civil and criminal attributes of the applicable state statutes was necessary in that case.

The split of authority between the Sixth and Ninth Circuits was recognized but reserved by this Honorable Court in California v. Cabazon Bank of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 1091 (1987), where the Court affirmed the Ninth Circuit's holding that:

> whether a tribal activity is a "violation of the law of a state" within the meaning of the OCCA depends on whether it violates the public policy of the State . . . .

107 S.Ct. at 1090. The Court then agreed with the Ninth Circuit that California's bingo statute was more a civil law that could not serve as the basis of a § 1955 prosecution.

In Cabazon, the subject California bingo law included many of the regulations characteristic of T.C.A. § 39-6-609. The State of California argued that because the violations of many of those regulations

were misdemeanors, the bingo laws were criminal in nature. But significantly, the Court held that even though an otherwise regulatory law is enforceable by criminal as well as civil means, this does not necessarily convert the law into a "criminal" law within the purview of § 1955. The Court noted that the Organized Crime Control Act only makes "certain violations of state and local gambling laws violations of federal law." Id. at 1090. In support of its opinion, the Court favorably cited a line of cases which had looked to such a balancing analysis: Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981); Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir.1982); and Oneida Tribe of Indians of Wisconsin v. Wisconsin, 518 F.Supp. 712 (W.D. Wis.1981).

Comparing the two positions, it is apparent that the line of cases including this Court's decision in Cabazon, which favors a balancing analysis and an examination of the public policy of the forum state, is the better reasoned one. The contrary view undermines one of the basic elements of § 1955 -- that what is

not illegal gambling under state law cannot be made illegal gambling under § 1955. Further, the federal courts invade the province of the state legislatures in determining what does and does not constitute criminally proscribed gambling in the particular forum state.

Because the operation of bingo games was removed from the realm of Tennessee's criminal gambling laws to the greatest extent possible under the Tennessee Constitution, because it is ambiguous whether bingo games which failed to satisfy the exemption conditions contained § 39-6-609(a) were subject to criminal or civil sanctions, and because Tennessee's bingo statue clearly evidences a strong public policy in favor of bingo, the federal government has no basis to satisfy the "is a violation of the law of (the forum state)" requirement of § 1955. Accordingly, because the government cannot establish the first element of the offenses charged against Mrs. Hurst as a matter of law, the indictment fails to state a valid cause of action against her and her convictions below must be vacated.

III. THE FEDERAL GOVERNMENT'S RELIANCE ON AN UNCONSTITUTIONAL, VOID AB INITIO STATE STATUTE IN ITS INDICTMENT AND IN ITS CASE IN CHIEF TO ESTABLISH AN ESSENTIAL ELEMENT OF THE OFFENSE ALLEGED VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT OF THE DUE PROCESS OF LAW.

A. T.C.A. § 39-6-609 Is Void From Its Inception As a Matter Of Law.

As previously noted, T.C.A. § 39-6-609 was declared unconstitutional by the Tennessee Supreme Court February 27, 1989, some eight and one-half months prior to the date the indictment was returned, November 15, 1989. Having been declared unconstitutional, § 39-6-609 is void ab initio and therefore "is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never passed." Franks v. State, 772 S.W.2d 428, 431 (Tenn. 1989), quoting Norton v. Shelby County, 118 U.S. 425, 442 (1886). An unconstitutional act is void from the date of its enactment, and there can be no valid conviction under it. Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed.2d 110 (1972).

B. The Extensive, Affirmative Reliance Upon T.C.A. § 39-6-609 In the Indictment and in the Government's Case In Chief Violated Mrs. Hurst's Constitutional Right of Due Process

Section 39-6-609 being void ab initio, the government's affirmative reliance upon the provisions of § 39-6-609 in its indictment and in its case-in-chief to satisfy § 1955 (b)(1)(i) and the trial court's similar reliance on § 39-6-609 in its instructions to the jury violated Mrs. Hurst's constitutional right of due process. Mrs. Hurst's convictions being improperly obtained in this manner, they must be reversed.

First, even if the subsection (a) exemption conditions are construed against Mrs. Hurst as being prerequisites for exempting the subject bingo game from Tennessee's gambling laws, then if the void exemption conditions were to be raised at all, they were to be raised by Mrs. Hurst. They were not to be affirmatively relied upon by the government to attempt to state an offense and to set up requirements, the violation of which would subject her to criminal prosecution and conviction.

In essence, by pleading and affirmatively relying upon the exemption conditions in subsection (a), the government forced Mrs. Hurst to contend with an affirmative defense that she did not choose. The government's position below that Mrs. Hurst had to rely upon any part of § 39-6-609 is misplaced. Mrs. Hurst was under no duty to raise the exemption conditions in subsection (a) of § 39-6-609 in this case. She may have wished to rely upon the bingo game exception contained in 18 U.S.C. § 1955 (e), or any of the other defenses available to her. Or, and perhaps more poignantly, Mrs. Hurst may have wished not to raise any affirmative defenses or put on any proof at all.

"A fundamental purpose of the due process clause is to allow the aggrieved party the opportunity to present his case and have its merits fairly judged." Pollack v. Baxter Manor Nursing Home, 716 F.2d 545, 546 (8th Cir. 1983). By affirmatively relying upon the void exemption conditions set forth in § 609 (a) to establish an essential element of its offenses charged against Mrs. Hurst, the

government violated Mrs. Hurst's constitutional right of due process by forcing her to contend with an affirmative defense not of her own choosing.

Second, with respect to the government's reliance upon subsections (b) through (i) of § 39-6-609, because the regulations contained in those subsections did not even address the issue of whether the subject bingo game was contrary to the anti-gambling laws of Tennessee, the government's position below that the Mrs. Hurst had to attempt to rely upon those portions of § 609 anyway defies logic.

Paragraph after paragraph of the indictment, witness after witness, and paragraph after paragraph of the trial court's instructions to the jury affirmatively relied upon void Tennessee regulations to establish that the subject bingo game was a business "which (was) a violation of the laws of (Tennessee)" under §1955 (b)(1)(i). In short, the government has relied upon regulations which, as a matter of law, afford no duties in order to suggest to the jury that Mrs. Hurst had a duty to obey them and to suggest that

because she did not she was subject to conviction under § 1955.

As the United States Supreme Court noted in Ex Parte Siebold:

> (The constitutionality of a statute) effects the foundation of the whole proceedings. An unconstitutional law is void and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and can not be a legal cause of imprisonment.

100 U.S. 371, 376-77 (1879).

For these reasons, the convictions against Mrs. Hurst were improperly obtained and must be reversed. Though somewhat novel, the constitutional implications of this issue merit consideration by this Court.

CONCLUSION

To ensure that the scope of the Organized Crime Control Act is not exceeded in derogation of Congressional intent, to safeguard the States' ability to define what constitutes criminal conduct under their own laws, and to protect petitioner's constitutional rights to a fair trial, Petitioner Hurst respectfully and most strongly urges the Court to grant a writ of certiorari in this case.

Respectfully submitted,

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Nos. 90-6235/6448/6254

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGINIA HURST (90-6235);
SAM T. BURNETT (90-6448);
and EDDIE E. SHUTT (90-6254),
Defendants-Appellants.

ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed December 13, 1991

Before: RYAN and NORRIS, Circuit Judges; and DUGGAN, District Judge.[1]

RYAN, Circuit Judge. Defendants Virginia Hurst, Sam T. Burnett, and Eddie E. Shutt appeal their convictions for

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[1]The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

engaging in an illegal gambling business under the laws of the State of Tennessee, in violation of 18 U.S.C. § 1955, and conspiracy, 18 U.S.C. § 371. Burnett also appeals his conviction on seven counts of mail fraud, in violation of 18 U.S.C. § 1341.

I.

This case arises from the operation of an illegal commercial, "storefront" bingo hall. The indictment alleged that defendants Hurst, Burnett, and Shutt, along with government witness James V. Long, conspired to conduct an illegal gambling business in violation of the laws of the State of Tennessee by acquiring and controlling the charter of a 26 U.S.C. § 501(c) tax-exempt organization, fraudulently filing documents with the State of Tennessee in order to gain a bingo permit, and personally profiting from the operation of an ostensibly nonprofit, charitable bingo game. The charges specifically referred to the defendants' actions in conducting bingo games under the auspices of the Columbia Scholarship Fund, Inc. (CSF) between September 1986 and January 1987.

Bingo, because it is a form of gambling, is illegal in Tennessee. During the time periods relevant to this case, however, bingo operations conducted by certain tax-exempt religious or charitable organizations were exempted by statute from the gambling laws. The statute provided that state-licensed bingo games were to be regulated and supervised by the Charitable Solicitations Division of the Tennessee Secretary of State. This charitable bingo exemption was declared unconstitutional by the Tennessee Supreme Court in 1989, and thereafter repealed by the Tennessee Legislature.

Long, the government witness, was a neighbor and friend of W. D. (Donnie) Walker, the Tennessee Secretary of State's chief compliance officer in the Charitable Solicitations Division. Anticipating, correctly, that his friendship with Walker would prove beneficial, Long decided to form a loosely organized association of illegal storefront bingo operators and to serve as a lobbyist for the association. The scheme Long and the bingo operators used to avoid prosecution was to obtain the charter of a section 501(c) tax-exempt

organization in order to operate the games under its auspices as a tax-exempt charitable or religious organization. Virginia Hurst operated several such bingo games in Knoxville, Tennessee, and was a member of Long's association, contributing dues as well as providing Long with money for the purpose of paying off Walker.

As part of his services, Long would, upon the request of a prospective illegal bingo operator, locate an inactive, nonprofit organization with section 501(c) tax-exempt status. With Long's assistance, false documents would be filed to reactivate the organization's charter for the ostensible purpose of obtaining a permit to conduct a state-licensed charitable bingo.

The origins of the CSF charter date back to 1975 when Shutt, along with six others, formed a nonprofit organization known as the Columbia Military Academy Alumni Association. Following the closing of the academy in 1979, the association held no meetings and filed no annual corporate reports with the Tennessee Secretary of State. In March 1983, the Secretary of State's Office revoked the

Columbia Military Academy Alumni Association's charter due to its failure to file annual reports.

In October 1984, Shutt, listing himself as president of the association, sought to reactivate the association for the purposes of obtaining a bingo permit. He filed amendments to the organization charter changing its name to the Columbia Scholarship Fund, Inc. and its address to his residence. In early 1985, Shutt sought Long's assistance in establishing a bingo hall in Columbia, Tennessee. Long felt that Columbia would not be a good spot for bingo and, having already spoken with Hurst about opening a bingo hall in the Crossville, Tennessee area, persuaded Shutt to set up the CSF bingo game there. It was agreed that Shutt would "lease" the CSF charter for $800-$1000 to Hurst and Long for the operation of the CSF-Crossville bingo game.

Also early in 1985, Burnett, who was serving as a Tennessee state legislator, approached Long to express an interest in becoming involved in bingo. Long informed Burnett that he intended to open a bingo hall in Crossville and had already located

an operator to conduct the game. Burnett, an attorney, told Long that he was representing an individual from Florida who might be interested in investing in bingo. Hurst, Burnett, and Long later met and decided that Hurst would receive 40 percent of the profits for setting up and running the bingo hall, Burnett and his investor would provide half of the capital necessary and would receive 40 percent of the profits, and Long would provide the remaining half of the capital for a 20 percent return. Long testified that he agreed to the lesser percentage because he felt it advantageous to include state legislator Burnett.

Burnett thereafter contacted his "Florida" investor, Joseph Cappello, advising him of the amount of capital that would be necessary to become involved as a partner in the Crossville bingo hall. Joseph Cappello was in prison at the time and, therefore, instructed his wife, Caprita Cappello, to send the money to Burnett. Caprita Cappello, although with some hesitation, eventually issued a series of six checks to Burnett totalling $48,000.

Each of these checks was the basis for one of the mail fraud counts against Burnett.

After some effort during January 1986, Hurst located a suitable building for the bingo hall in Crossville. Hurst signed the lease agreement for the building. By this time, Shutt had already filed articles of amendment to the CSF charter and changed the organization's address. In February 1986, Hurst induced her associate, Wilbur Lee Riggs, to open a bank account in Crossville in the name of CSF. Dorothy Varnell, another of Hurst's associates, listed herself as chief executive officer of CSF and filed an application with the state of Tennessee for a permit to conduct bingo under the auspices of the organization. Varnell testified at trial that she had never been a member of CSF, nor had she ever been a resident of Crossville, Tennessee, as the application stated. On instructions from Hurst and Long, Varnell also signed numerous applications which falsely stated that the individuals named therein were members of CSF so that they might also conduct bingo at the Crossville location.

Acting upon these falsified documents, the Tennessee Secretary of State's Office approved CSF's application on September 19, 1986 for a permit to conduct bingo. The defendants started conducting a bingo game in the name of CSF soon after receiving this permit. In the following months, the defendants and other co-conspirators prepared additional false statements certifying that workers in the CSF bingo game were members of the organization in good standing and had been members for a period of at least one year. The CSF bingo hall, however, was not as successful as hoped, and the operation was terminated in January 1987.

Meanwhile, Joseph Cappello was becoming anxious to reap the rewards of his investment in the CSF bingo operation. The six checks issued by Caprita Cappello had been received by Burnett and deposited into his attorney-at-law trust account, except for one check, #9977, in the amount of $10,000. Check #9977 was given by Burnett to Long who gave it in turn to Hurst. Hurst then instructed Riggs to deposit the check into the CSF bank account which Riggs had previously opened. Burnett also wrote

a check from his trust account payable to CSF in the amount of $5,000. The rest of the Cappellos' money in the trust account was used by Burnett for his own personal expenses. As one example, the government presented evidence showing that Burnett used the Cappellos' money to pay his own real estate taxes.

When Joseph Cappello asked Burnett how things were going, Burnett assured him that everything was fine and, in November 1986, even provided Joseph Cappello with a bank signature card in order to open an account for the returns on his investment. The CSF bingo game was not profitable, however, and Burnett never opened any account for the Cappellos. Having failed to receive a satisfactory accounting from Burnett, Joseph Cappello sought the services of an attorney. The Cappellos' attorney attempted to meet with Burnett and requested several times that Burnett return the Cappellos' money. Burnett instead mailed false invoices to the Cappellos' attorney, seeking to conceal his use of approximately $33,000 of the Cappellos' money for his own personal expenses. The false invoices were provided to Burnett by

Long, who also ran a bingo supply company, and reflected fictitious sales of various bingo supplies by Long's company to the CSF bingo game totalling $39,691.79. The mailing of the false invoices formed the basis of the final mail fraud count against Burnett.

II.

A.

"Violation of the Law of a State" under 18 U.S.C. § 1955

Congress enacted 18 U.S.C. § 1955 as the Organized Crime Control Act of 1970. The statute provides, in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section--
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> (1) "illegal gambling business" means a gambling business which--
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> (i) is a violation of the law of a State or political

> subdivision in which it is conducted;
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> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. § 1955.

All three defendants appeal their convictions under section 1955 on the grounds that the State of Tennessee legalized the game of bingo under Tenn. Code Ann. § 39-6-609 and that the indictment, therefore, failed to state a violation of the laws of a state as required under section 1955 (b)(1). These contentions rely primarily on statements of the Tennessee Supreme Court in Secretary of State v. St. Augustine Church, 766 S.W.2d 499 (Tenn. 1989). Specifically, the defendants claim that St. Augustine Church stands for the proposition that bingo was a legalized form of gambling in Tennessee

during the times relevant to the activities in this case.

Their reliance however, is misplaced. Nowhere in St. Augustine Church did the Tennessee Supreme Court declare that bingo, per se, was a legal form of gambling in Tennessee. Nor did the Tennessee Legislature, in exempting certain qualified charitable bingo operations under section 39-6-609, ever exempt the game of bingo from its general prohibitions on gambling under Tenn. Code Ann. § 39-6-607 and 39-6-608.

Under Tennessee law, "bingo" and gambling" were defined as follows:

> (1). "Bingo" shall mean a game of chance in which players place markers on a pattern of numbered squares, according to numbers drawn and announced by a caller.
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> . . . .
>
> (3). "Gambling" means risking any money, credit, deposit, or other thing of value for gain contingent in whole or part upon lot, chance or the operation of a gambling device, but does not include: bona fide contests of skill, speed, strength or endurance

> in which awards are made only to entrants or the owners of entries; bona fide business transactions which are valid under the law of contracts; and other acts or transactions expressly authorized by law;

Tenn. Code Ann. § 39-6-601 (repealed 1989). Thus, bingo, as a game of chance, was a form of gambling unless "expressly authorized by law." According to sections 39-6-607 and 608, one who engaged in gambling or professional gambling was guilty of either a misdemeanor or felony under Tennessee law.

An exemption to the general prohibition on gambling was carved out in section 39-6-609, which provided, in pertinent part:

> **Exceptions for tax exempt organizations - Regulation of bingo games.** - (a)(1) Sections 39-6-601 - 39-6-641 shall not apply to any bingo game, raffle, or similar game of chance conducted by a religious or charitable organization exempt from taxation pursuant to paragraph (3) of subsection (c) of § 501 of the

Internal Revenue Code of 1954, as amended . . . .

(2) Provided further, this exemption applies only if no part of the receipts from such activity enures to the benefit of any private shareholder, member, or employee of such organization; and only if all proceeds, after necessary and reasonable costs, be used for charitable or religious purposes, including educational and youth programs and constructing or maintaining a building to be occupied by the exempt organization; or for any legal purpose for which the organization was established. Provided further, the total of such necessary and reasonable cost, including constructing or maintaining a building to be used by the organization, salaries, and other expenses of conducting the activities permitted pursuant to the exemption provided in this subsection, shall not exceed twenty-five percent (25%) of the gross receipts derived from such activities. . . .

. . . .

(4) The exception granted by this section to a religious or charitable organization exempt from taxation pursuant to paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, shall only apply if the receipts of the activity are expended for a charitable or religious purpose within the state of Tennessee or are expended in an adjacent state when the funds provide a direct service or benefit to a Tennessee resident.

(b) The conduct of bingo games shall be strictly according to the following requirements:

. . . .

(2) Bingo games and raffles may be conducted only at the place of the organization's domicile and after the organization has been in existence for a period of not less than five (5) years during all of which time it shall have carried on the principal activity authorized by its corporate charter. . . .

> (3) The organization shall under no circumstances commingle its bingo proceeds with its general funds, but shall maintain a separate segregated account for its bingo operation, into which no other moneys shall be deposited.
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> . . . .
>
> (7) No person may conduct bingo on behalf of an organization who has not been a member thereof in good standing for not less than one year and a bona fide resident of the state and county for not less than six (6) months prior to the commencement by the organization to conduct bingo; and no member of an exempt organization shall receive compensation for conducting or assisting in the conduct of bingo.

Tenn. Code Ann. § 39-6-609 (repealed 1989).

While defendants claim to have operated an ostensibly legitimate bingo hall under the section 39-6-609 exemption, their failure to comply with the prerequisite conditions and the strict regulations for operating bingo games under the statutory exemption placed their operation squarely in violation of the

Tennessee gambling laws. Nonprofit, charitable bingo operations by qualified organizations were exempted from the general gambling prohibitions in Tennessee. Storefront bingo games for the personal profit of the operators were not. The claim that bingo, as conducted by defendants, was a legal form of gambling in Tennessee must fail.

Defendants next argue that the government's use of the Tennessee exemption statute, section 39-6-609, in framing the indictment and later the jury charge, was error.

Specifically, defendants acknowledge that while section 39-6-609(a) sets forth qualifications for legitimate bingo games and a violation of its provisions might provide for criminal gambling penalties, section 39-6-609(b) sets forth administrative regulations for the licensing of qualified bingo games and could in o way be construed as a criminal prohibition. Therefore, the argument continues, by using regulations from section 39-6-609(b) in the jury charge, the court invited the jury to convict defendants for violations of state law

which were unrelated to whether the bingo game in question was illegal. For example, defendants state that Tennessee bingo operators such as themselves could be convicted under federal criminal laws for having used a billboard larger than twelve feet in diameter, in violation of section 39-6-609(b)(8)(A), or for advertising in a local newspaper twice in one month, in violation of section 39-6-609(b)(8)(B).[2]

The litany of horrors posited by the defendants, however, has only marginal relevance to this case. The only possible regulation at issue is section 39-6-

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[2]Sections 39-6-609(b)(8)(A) and (b) provided:

> (8) Advertising for bingo games and raffles conducted under this section shall be limited to:
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> (A) A sign on the premises of not more than twelve (12) feet in diameter;
>
> (B) No more than one paid advertisement per month in a local newspaper and such advertisement may not exceed six (6) inches by four (4) columns.
> . . .

Tenn. Code Ann. § 39-6-609(b)(8)(A)-(B) (repealed 1989).

609(b)(7)(A), which required that a person conducting bingo must have been a member of the charitable organization for a period of one year and a resident of the state, county, or contiguous county for a period of six months. Defendants point to credibility problems with Long, the principal government witness, and to testimony from several others that they worked in the CSF bingo operation despite their not being members in good standing of the organization for one year, to argue that the jury likely rejected Long's extensive testimony as to the sham organization and the personal profit of the operators, and instead relied on the testimony of a few workers as to minor infractions in order to establish a violation of the gambling laws of Tennessee.

This result appears most unlikely on the record. the matter of the residence and membership of bingo workers went directly to the charge that CSF was not a real charity but rather was a cover for an illegal storefront bingo operation. The evidence did, in fact, state a major violation of the Tennessee gambling laws.

Despite defendants' arguments that the jury might have convicted them for a trivial violation such as having a thirteen-foot billboard, they can point to no portion of the indictment or jury charge which would have permitted such a result. Neither the evidence presented nor the jury charge support this contention.

Finally, defendants ask the court to recognize a distinction between civil/regulatory and criminal/ prohibitory laws as the Court of Appeals for the Ninth Circuit did in United State v. Farris, 624 F.2d 890 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981). See also Cabazon Band v. County of Riverside, 783 F.2d 900 (9th Cir. 1986), aff'd sub nom., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); and Barona Group of the Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983). In those cases, the Ninth Circuit was called upon to decide whether section 1955 was violated by an Indian tribe that conducted bingo games on an Indian reservation in a way that violated the provisions of state law. In Farris, the court held that because the

public policy of the State of Washington prohibited large-scale gambling businesses of the type being operated by defendants on Indian trust land in the state, section 1955 applied. Id. at 893-896. According to the Ninth Circuit, the test is whether the tribal activities, conducted in violation of some of the terms of the state law, are violative of the public policy of the state. Farris, 624 F.2d at 895.. In Cabazon and Barona, the court held that because the California bingo laws were merely civil/regulatory in nature, they could not serve as a predicate for a section 1955 violation. "[B]ingo games are not contrary to the public policy of California, [hence] the activity is not violative of [section 1955]." Cabazon, 783 F.2d at 903. The defendants ask us to hold that, based on the Ninth Circuit's reasoning, the Tennessee laws which permitted some limited bingo were like the California statute, merely civil/regulatory and therefore not a valid predicate for a section 1955 prosecution.

The short answer to the defendant's contention is that this court has rejected the civil/regulatory test in section 1955

prosecutions in United States v. Dakota, 796 F.2d 186 (6th Cir. 1986). The court observed that the Ninth Circuit analysis was developed in the context of civil litigation primarily concerned with the interpretation of Public Law 280 that governs the enforcement of state statutes on federal Indian reservations. The Dakota court stated that "the criminal/prohibitory-civil regulatory test is inappropriate to an interpretation of 18 U.S.C. § 1955" in a declaratory judgment action seeking to enjoin bingo games being conducted on an Indian reservation, in violation of a Michigan statute. Id. at 187-88. The question, the Dakota court said, was whether the gambling activities of the Indian reservation amounted to a "violation of the law" of the State of Michigan. Id. at 188-89. The court refused to determine that question by employing a criminal/prohibitory-civil/regulatory test, declaring:

> Finally, we note the criminal/prohibitory-civil/regulatory test requires courts to make arbitrary classifications of state laws. As states frequently pass laws that to some extent both regulate and prohibit a given activity, the test is

> difficult to apply. This difficulty further supports our conclusion that the criminal/prohibitory-civil/regulatory test should not be extended outside of the context [of the interpretation of Pub. L. No. 280].

Id. at 189. This, of course, is not a declaratory judgment action against an Indian tribe. Nevertheless, the reasoning of this court in Dakota in rejecting the criminal/prohibitory-civil/regulatory test is equally applicable here. Storefront, for profit bingo operations of the type charged in this case are clearly contrary to Tennessee public policy and the evidence demonstrates that the defendants flagrantly violated Tennessee criminal laws prohibiting gambling. The Tennessee laws at issue were clear: bingo was illegal, absent an operator's narrowly circumscribed status as a qualified charitable organization conducting games in strict adherence to the rigid conditions set forth for nonprofit bingo games. Equally clear is the evidence that defendants violated these qualifying and operations conditions. The false documentation establishing CSF as a charitable organization in this case, and the operation of a commercial, for profit

bingo hall under the organization's auspices, were manifest violations of the criminal laws of the State of Tennessee. For these reasons, the defendants' argument that the criminal laws of Tennessee were not violated must be rejected.

B.
Constitutionality of Section 39-6-609 under the Tennessee State Constitution

Defendants argue that the Tennessee Supreme Court's ruling in St. Augustine Church, 766 S.W.2d 499, declaring the exemption statute, section 39-6-609, unconstitutional because the game of bingo was a prohibited "lottery" under the Tennessee Constitution, made that law void *ab initio* and voids subsequent prosecutions using that law to establish the "violation of the law of a State" element of section 1955.

As we have stated, the government did not depend on the violation of section 39-6-609 to establish a violation of the laws of Tennessee, but instead relied upon violations of the state's general gambling prohibitions in sections 39-6-607 and 39-6-608. Any evidence establishing violations of the provisions of section

39-6-609 was not necessary. It was no more than additional burden the prosecution assumed in order to clarify and explain defendants' acts in operating and promoting a sham charitable organization and bingo hall.

Furthermore, regardless of whether the Tennessee Legislature's attempt to legalize bingo was lawful under the Tennessee Constitution, it is nevertheless true that bingo, if it failed to meet the prerequisite conditions set forth in section 39-6-609, was unlawful during all relevant periods of time. The fact that the exemption law was ultimately determined to be beyond the power of the Tennessee Legislature does not void the federal government's reliance upon that law to establish that defendants' bingo operations were contrary to the laws of the State of Tennessee. The game of bingo was illegal in Tennessee except if conducted by a qualified charitable organization and according to strict regulations. The unconstitutionality of section 39-6-609, an exemption law, did not prohibit this prosecution any more than it made properly licensed and conducted charitable bingo

games illegal during the relevant time. Defendants misused the exemption law for charitable organizations in order to make their illegal bingo operation appear legitimate. They cannot now complain of the unconstitutionality of that exemption.

C.

Entrapment by Estoppel Instruction

Defendants argue that the district court erred in failing to instruct the jury as requested on the defense of entrapment by estoppel. A conviction cannot stand under the Due Process Clause where a citizen exercises a privilege or engages in conduct after a state official tells the defendant that the particular conduct is legal and the defendant believes the official. In Cox v. Louisiana, 379 U.S. 559, 571 (1965), the Court held that express and affirmative statements by police officials granting defendants permission to picket across the street from a courthouse required reversal of convictions for demonstrating "near" a courthouse. Similarly, in Raley v. Ohio, 360 U.S. 423, 438 (1959), convictions for contempt for failing to answer questions

before a state commission were reversed where officials before a state commissions were reversed where officials mistakenly instructed defendants of their right to exercise their privilege against self-incrimination contrary to a state law depriving them of the privilege.

Defendant Hurst contends that the requested entrapment by estoppel instruction was warranted by testimony that she relied on the actions of compliance personnel of the Tennessee Secretary of State's Office who were aware that the same people were working for her at bingo games for two different charitable organizations yet took no action regarding these apparent violations. Defendant Shutt relies on statements that he testified were made to him by David Collins, an acquaintance and attorney in the Secretary of State's Office, and Donnie Walker, chief compliance officer in the Secretary of State's Charitable Solicitations Division. Collins, who had authority in the area of elections, not bingo laws, apparently told Shutt that he could raise money for the Columbia Military Academy by starting a bingo hall. Walker, in response to

questions from Shutt regarding the use of a charitable charter for the purpose of playing bingo, did not indicate that there was anything wrong with Shutt's receiving $800 for the use of CSF charter and allegedly suggested that Shutt "make up" minutes of meetings required to show that the organization was genuine. Defendant Burnett also appears to rely on those same statements by Donnie Walker as the basis of an entrapment defense.

A defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in the defendant's favor. Matthews v. United States, 485 U.S. 58, 63 (1988). In this case, however, there is simply no evidence that the defendants were ever told by state officials that their actions were legal. Walker instructed Shutt on how to flout the law, not how to abide by it, and statements by Collins contained no indication that falsified documentation and personal profits were legal under Tennessee bingo laws. Similarly, compliance officers did not tell Hurst that employing nonmembers to work bingo halls in multiple

locations was legal. Instead, they simply failed to enforce the law. If this court were to accept Hurst's contention that mere nonfeasance in law enforcement was tantamount to official approval of illegal acts and entrapment, there would scarcely a speeding ticket not subject to due process challenge.

Moreover, the statements allegedly relied upon were made by state officials relating to state law, while the defendants were charged with violations of federal law. One of the purposes of section 1955 was to aid in the enforcement was disabled by corruption of state officials. Farris, 624 F.2d at 892. Allowing a state official's alleged complicity in illegal activities to void the convictions here would violate the intent of Congress in enacting section 1955 and distort the clear due process doctrine set forth in Cox and Raley.

D.

Specific Conduct Evidence

Defendant Shutt appeals the trial court's ruling permitting inquiry upon cross-examination concerning the details of his prior conviction. Shutt pleaded guilty

in 1983 to charges of attempting to obstruct justice. The conviction stemmed from a prosecution for bank robbery in which Shutt offered a bribe to a police chief in an attempt to have the officer file a false document creating an alibi for the defendant. On direct examination, Shutt's attorney elicited from him the fact that he had been previously convicted of attempted obstruction of justice. On cross-examination, the government sought to question Shutt as to some of the specifics of the crime. Relying on United States v. Rosa, 891 F.2d 1063, 1069 (3d Cir. 1989), where the court wrote that "[b]ribery . . . is not the kind of conduct which bears on truthfulness or untruthfulness." Shutt contends that his actions were not the kind bearing on truthfulness or untruthfulness and, since the prior conviction was acknowledged by Shutt on direct examination, the government was not allowed to revisit the issue or to inquire as to details of the crime.

The trial court, after hearing arguments outside the presence of the jury, overruled Shutt's objection, holding that Shutt's credibility was at issue and that

the specific conduct of attempting to bribe a police officer was relevant to his truthfulness and untruthfulness. The ruling was based upon Fed. R. Evid. 608(b) which permits inquiry on cross-examination into specific instances of conduct bearing on the credibility of a witness if probative of truthfulness or untruthfulness.

The government's questioning proceeded as follows:

> Q. Mr. Shutt, Mr. Wyckoff asked you why you pleaded guilty of [sic] the charge of obstruction of justice and you answered because you were guilty, is that correct?
>
> A. Yes sir.
>
> A. And at that time in 1982, sir, you were charged in the Western District of Tennessee, were you not, with attempting to obstruct justice by offering Jerry Wyatt, chief of police in Brownsville, Tennessee, a payment of up to $10,000 to Jerry Wyatt if Jerry Wyatt would place a false document in the Brownsville Police Department records showing that David Eugene Graham had been in the Haywood County, Tennessee area on August the 7th of 1979 between nine o'clock and nine-twenty a.m. The purpose of that false document was to create an alibi for David Eugene Graham who was to go to trial two days later on September

> the 8th of 1982 in the United States District Court in the Eastern District of Tennessee, that is in Chattanooga, in which David Graham had been charged with bank robbery which had occurred on August the 7th, 1979. And that was the basis for your obstruction of justice charge, wasn't it, sir?

Immediately after defendant Shutt affirmed the correctness of the allegation contained in the indictment, the court instructed the jury as follows:

> Now, ladies and gentlemen, you'll consider this evidence that you've just heard concerning the facts related to Mr. Shutt's prior conviction solely as it bears on the issue of his credibility which is for you to judge, that is his truthfulness or untruthfulness, and it's for that limited purpose solely that you are to consider this testimony. As I say, as it bears on his--the issue of his credibility.
>
> You're not to consider this evidence for the purpose of any propensity, having committed one crime that he would commit another; that is you're not to decide this case on some kind of bad man theory. You clearly understand that. This testimony solely and only goes to the issue of his truthfulness or untruthfulness, that is his question of credibility. You clearly understand that.

Whether a specific conduct is probative of the truth and honesty of a

witness under Rule 608(b) is a matter within the discretion of the trial court. United States v. Vinson, 606 F.2d 149, 156 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980), reh'g denied 445 U.S. 972 (1980). Where the accused has disclosed a prior conviction, it is not necessarily prejudicial to allow cross-examination developing its circumstances. United States v. Graham, 325 F.2d 922, 927 (6th Cir. 1963). In this day in which most guilty pleas are products of plea bargaining, and usually charge bargaining, the statutory name of the offense to which a defendant pleads guilty is rarely informative, and often misinformative, about the nature of the offense to which guilt is acknowledged as the plea allocation. It is often appropriate, indeed necessary, if the fact finder is to be able to evaluate the significance of the prior conviction to the witness' credibility, that some details of the truthfulness-related offense be described. In this case, the trial court did not abuse its discretion in determining that the specific conduct resulting in Shutt's prior conviction was a relevant consideration as

to his veracity or in allowing the prosecution to question Shutt briefly in order to explain the nature of the conviction. The conduct was not merely bribery, as Shutt argues, but subornation of perjury. It was well within the discretion of the trial court to conclude that the conduct was probative of the truthfulness or untruthfulness of the witness. To the extent that the Third Circuit's opinion in Rosa, 891 F.2d at 1069, might be read to suggest that bribery-related offenses are not probative of a witness' truthfulness or untruthfulness in all cases, we disagree.

Further, the scope of cross-examination was narrow and brief. The government did not badger the witness, nor did it exhaustively comb the subject. A cautionary instruction was also issued to the jury immediately following this questioning. Thus, not only did the trial court act within its discretion, but Shutt fails to make and adequate showing of prejudice.

E.
Variance Between Indictment and Evidence

Defendant Burnett contends that a fatal variance exists between the terms of the indictment and the evidence at trial on the six counts of mail fraud related to the series of checks received Caprita Cappello. Burnett argues that there was no evidence of his having directly informed Caprita Cappello of the "investment opportunity" and that it was she, not Joseph Cappello, who wrote the checks. Thus, Burnett claims that because he was charged with having defrauded Joseph Cappello, although the evidence showed that it was Cappello's wife who provided the money, Burnett was convicted of a crime different than the one charged in the indictment and is still subject to another prosecution for defrauding Caprita Cappello.

Not every variation between the indictment and the proof is unfair. A fatal variance occurs only where there has been such a variance as to "affect the substantial rights" of the accused. United States v. Zelinka, 862 F.2d 92, 96 (6th Cir. 1988) (quoting Berger v. United States, 295 U.S. 78, 82 (1935)).

Substantial rights are affected only when a defendant shows "'prejudice to his ability to defend himself at trial, to the general fairness of the trial, or to the indictment's sufficiency to bar subsequent prosecutions.'" Id. at 97 (quoting United States v. Miller, 471 U.S. 130, 138 n.5 (1985)).

The alleged variance in this case, it one exists, is certainly not fatal. The indictment clearly set forth a charge that Burnett defrauded both Joseph and Caprita Cappello by investing "their monies." The fact that the checks were written from an account that Caprita Cappello testified was her separate property did not affect Burnett's ability to defend himself against the charge of scheming to defraud the couple, nor does it open Burnett up to new charges with respect to Caprita Cappello. Burnett dealt with Joseph and Caprita Cappello as a couple, sending letters explaining the investment plans to Caprita's Florida address. Burnett's scheme was addressed to both Joseph and Caprita Cappello, and the indictment charged him with such an offense. There

was no fatal variance between the crime charged and the evidence presented.

F.
Prosecutorial Misconduct

Two arguments are raised by defendants with respect to the government's closing arguments. First, defendants Burnett and Shutt argue that the prosecution improperly vouched for the credibility of the principal government witness, James Long. Second, defendant Shutt argues that a mistaken statement of fact by the prosecution denied him a fair trial and mandates reversal of his conviction. We address the vouching issue first.

Following repeated arguments by counsel for the defendants that Long had lied and told the government what it wanted to hear, and statements by Burnett's counsel that the government prosecutors "don't represent the United States" and implying vindictive prosecution, the prosecutor stated, in closing arguments:

> Mr. Long testified before you that he is a convicted felon in his own right. No doubt about it, he has paid those penalties of conviction and his penalties and sentencing are just yet to come.

> Now, the defense has made much to-do about what his motivations are of coming before you and testifying. Let me tell you that the Government has done as much as we can do to insure his credibility as a witness. First of all, myself, Mr. McDonough, Mr. Knudsen, we do in fact represent the United States of America. As representatives of the United States, I have an obligation, Mr. McDonough has an obligation Mr. Knudsen has an obligation not to bring to you perjured testimony, and our obligation, particularly Mr. McDonough and myself as prosecutors are equally to protect the innocent as much as prosecute and bring to task those individuals--.

At that point, defense counsel objected. The trial court instructed the jury that it was improper for an attorney to vouch for a witness' credibility, though it found that "nothing had been said that would justify vouching."

A government attorney has a duty not to express a personal opinion or belief regarding the truth or falsity of any testimony or evidence. United States v. Young, 470 U.S. 1, 8 (1985). We agree with the trial court, however, that there was no vouching by the prosecution in this case. In response to attacks on the credibility of the government's main witness, the

prosecutor sought to explain his efforts to ensure full and honest disclosure by Long. The statements did not constitute an expression of personal belief or opinion concerning Long's veracity.

The second allegation of prosecutorial misconduct is raised by defendant Shutt alone. In response to repeated statements by Shutt's counsel that Shutt was not present when the conspirators were arranging to split the proceeds and planning the sham operation, the prosecutor, in closing arguments, stated:

> Now, with respect, first of all, of with Mr. Shutt, Mr. Wyckoff, to take them in reverse order, Mr. Wyckoff started off with Shutt, that's where this whole nefarious criminal activity starts. Mr. Wyckoff made a lot of mention of the fact that Mr. Shutt wasn't there in Memphis when James V. Long was getting involved with William McBee, with Tom Powell, with others in the Holy Family Miracle Temple, making and getting himself involved in conspiracy and conviction in that district.
>
> No, ladies and gentlemen, he sure wasn't, he was in federal prison with Thomas Burnett in Montgomery, Alabama at Maxwell Air Force Base--.

At which point defense counsel again objected.

Shutt contends that this misstatement denied him a fair trial. It was initially argued that the statement was irrelevant and, in all events, "not in the record." Later, when it was determined that Shutt was not in prison at the time he claimed, it was asserted that the prosecution had intentionally misstated the facts. After listening to the prosecution's examination, the trial court found no basis for concluding that the prosecution made an intentional misstatement, and the jury was instructed to disregard the statements and that the government "had been mistaken." Shutt repeats these claims on appeal, arguing that the misstatements were intentional and prejudicial.

There is no reason to reverse Shutt's conviction in this case. While the government contends that the mistaken statements were invited responses to the arguments of the defense counsel, we need not embark upon a discussion of the doctrine of invited error, for there simply appears no evidence that Shutt was denied a fair trial by these statements. In order to deny a defendant the right to a fair trial, prosecutorial misconduct must be

"'so pronounced and persistent that it permeates the entire atmosphere of the trial,'" United States v. Thomas, 728 F.2d 313, 310 (6th Cir. 1984) (quoting United States v. Lichenstein, 610 F.2d 1272, 1281 (5th Cir.), cert. denied, 447 U.S. 907 (1980)), or "'so gross as probably to prejudice the defendant,'" United States v. Ashworth, 836 F.2d 260, 267 (6th Cir. 1988) (quoting United States v. Flake, 746 F.2d 535, 542 (9th Cir. 1984), cert. denied, 469 U.S. 1225 (1985)). The statement at issue here was accidental and isolated; it was not pronounced, persistent, or intentional. Moreover, the statement was immediately followed by two cautionary instructions to the jury. There was no unfair prejudice to defendant Shutt.

G.
Remaining Issues

The remaining issues raised on appeal need not detain us long. First, defendant Burnett argues that the failure of the trial judge to recuse himself from this case denied Burnett a fair trial and constitutes reversible error. As a private attorney years earlier, the trial judge

filed a lawsuit against Burnett on behalf of a group of investors alleging fraud. Burnett moved for recusal. The court denied the motion and this court denied Burnett's petition for a writ of mandamus on May 9, 1990. The standard for recusal under 28 U.S.C. § 455(a) is "whether [a] reasonable person, knowing all of the surrounding circumstances, would consider the judge to be impartial." United States v. Norton, 700 F.2d 1072, 1076 (6th Cir.), cert. denied, 461 U.S. 910 (1983). We are satisfied that a reasonable person would consider the trial judge to be impartial in this matter and find no prejudice toward defendant Burnett.

Next, defendant Hurst argues that the admission of the testimony of witnesses Marshall Cranford, Charles Haston, and Marshal Ledbetter was improper. The witnesses chartered an organization in March 1984 named the Columbia Military Academy Alumni Association, Inc. The virtually identical name of this organization and the one founded by defendant Shutt in 1975 caused some confusion n the Tennessee Secretary of State's Office, especially after Shutt

sought to reactivate the old charter in October 1984. The witnesses testified that they did not form the organization in order to conduct a bingo game and never intended to do so. Hurst maintains that the testimony was irrelevant and injected an impermissible "moral tone" regarding gambling into the proceedings. We disagree. The trial court has the discretion to decide relevancy questions. United State v. Dabish, 708 F.2d 240, 243 (6th Cir. 1983). In this case, while the evidence is of questionable relevance to material issues, we cannot say that the trial court abused its discretion in permitting the witnesses to testify. It is at least arguable that the testimony was probative of the issue of Shutt's intentions in reactivating the Columbia Military Academy Alumni Association for purposes other than promotion of the school and its alumni. Moreover, there is absolutely no showing of prejudice.

Finally, Hurst also appeals the imposition of a $50,000 fine, arguing that the maximum penalty for her convictions for illegal gambling and conspiracy was $30,000 under 18 U.S.C. §§ 371, 1955. However,

federal law permits fines of up to $250,000 for felonies committed prior to November 1, 1987 under 18 U.S.C. § 3623(a)(3), repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987 (repeal effective Nov. 1, 1987).

III.

For the foregoing reasons, the convictions of Virginia Hurst, Sam T. Burnett, and Eddie E. Shutt are **AFFIRMED.**

TENNESSEE CODE ANNOTATED § 39-6-609

TITLE 39: CRIMINAL OFFENSES
Chapter 6: Offenses Against Public Health, Safety or Welfare
Part Six: Gambling

39-6-609. Exceptions for tax exempt organizations - Bingo, raffles and games of chance. -- (a)(1) This part shall not apply to any bingo game conducted by a religious or charitable organization exempt from taxation pursuant to paragraph (2) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; or any labor organization exempt from taxation pursuant to paragraph (5) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; or any organization of war veterans, or post organization of war veterans exempt from taxation pursuant to paragraph (19) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; or, other nonprofit organization exempt from taxation pursuant to paragraph (7) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended, if no member or person receives any salary

from the operation of any bingo game conducted by such organization; or any organization exempt from taxation pursuant to paragraph (10) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; or any civic league or organization exempt from taxation pursuant to paragraph (4) of subsection (c) of § 501 of the Internal Revenue Code of 1954, as amended; any civic club or bona fide fraternal organization exempt from taxation pursuant to paragraph (8) or (10) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended; or any public or private nonprofit educational institution operating a school in the state of Tennessee. Any thing of value given by a person to participate in such bingo game, raffle or similar game of chance conducted pursuant to this section is deemed to be a charitable contribution and not consideration.

(2) Provided further, this exemption applies only if no part of the receipts from such activity enures to the benefit of any private shareholder, member, or employee of such organization; and only if all proceeds, after necessary and

reasonable costs, be used for charitable or religious purposes, including educational and youth programs and constructing or maintaining a building to be occupied by the exempt organization; or for any legal purpose for which the organization was established. Provided further, the total of such necessary and reasonable cost, including constructing or maintaining a building to be used by the organization, salaries, and other expenses of conducting the activities permitted pursuant to the exemption provided in this subsection, shall not exceed twenty-five percent (25%) of the gross receipts derived from such activities. The cost of prizes shall not be considered to be an item of expense when computing the necessary and reasonable cost.

(3) [Deleted by 1984 amendment.]

(4) The exception granted by this section to a religious or charitable organization exempt from taxation pursuant to paragraph (3) of subsection (c) of Section 501 of the Internal Revenue Code of 1954, as amended, shall only apply if the receipts of the activity are expended for charitable or religious purpose within the

state of Tennessee or are expended for a charitable or religious purpose within the state of Tennessee or are expended in an adjacent state when the funds provide a direct service or benefit to a Tennessee resident.

(b) The conduct of bingo games shall be strictly according to the following requirements:

(1)(A) The aggregate of prizes awarded in a single day shall not exceed five thousand ($5,000). The names of any winners of prizes which exceed the value of five hundred dollars ($500) per day shall be reported by the organization to the federal Internal Revenue Service;

(B) The aggregate of prizes, money or other things of value awarded for a single game of bingo shall not exceed one thousand dollars ($1,000). As used in this subdivision (B), unless the context otherwise requires, "single game of bingo" means a game using bingo cards which is completed when the participants are required to clear their cards or exchange such car. Provided, however, that nothing herein shall affect the maximums for aggregate of prizes awarded in a single day

as set forth in subdivision (A) of this subdivision (b)(1), above, in subdivision (6) of this subsection, or as set forth otherwise in this section.

(2) Bingo games may be conducted only at the place of the organization's domicile and after the organization has been in existence for a period of not less than five (5) years during all of which time it shall have carried on the principal activity authorized by its corporate charter. Provided, however, a school, facility for housing for elderly or handicapped persons, police department, fire department or chapter or affiliate of the Tennessee Council of the Blind may, upon the approval of the secretary of state for good cause shown, conduct a bingo game or raffle at a place other than such school's, facility's, department's, chapter's or affiliate's place of domicile provided that such other place is in the same county as the school's, department's, chapter's or affiliates place of domicile or in the same grand division as the facility's place of domicile. If such school, facility, department, chapter or affiliate seeks to conduct a bingo game at

a place other than its domicile, the specific location of such other place shall be provided to the secretary of state approves such specific location, the school, facility, department, chapter or affiliate may not conduct a bingo game at a place other than that specifically approved unless a new location change is requested in the same manner. Provided, further, however, that nothing in this section shall be construed to prevent a school department, chapter or affiliate from conducting a bingo game at not more than two (2) approved locations regardless of whether one(1) or both of such locations are on or off the campus, or a facility for housing for elderly or handicapped persons from conducting same at not more than three (3) approved locations. Provided further, that any bingo game authorized hereunder shall be located and conducted in a single specific building, wherein all of the players and those conducting the game are physically located, it being recognized that bingo is an event involving immediate and constant interaction among the participants; and that if this location

requirement is not met, the game will not be considered to be bingo;

(3) The organization shall under no circumstances commingle its bingo proceeds with its general funds, but shall maintain a separate segregated account for its bingo operation, into which no other moneys shall be deposited;

(4) The premises where bingo is conducted, or intended to be conducted, or intended that any equipment therefore be used, shall at all reasonable times be open to inspection by the secretary of state;

(5) Bingo may be conducted by an organization on not more than three (3) days per week or one hundred and fifty (150) days per year;

(6) Schools officially approved by the department of education located throughout the state may, upon receipt of a letter of approval from the secretary of state, operate games with the aggregate of prizes awarded in any single day at each approved location not to exceed five thousand dollars ($5,000) except during five (5) days out of every year when the aggregate of prizes awarded may not exceed ten thousand dollars ($10,000). Such

approved license holders may operate these games on a maximum of two hundred and twenty-five (225) days per years at each approved location, and in non-domicile locations upon approval of the secretary of state;

(7)(A) No person may conduct bingo on behalf of an organization who has not been a member thereof in good standing for not less than one year and a bona fide resident of the state and county or of a contiguous county for not less than six (6) months prior to the commencement by the organization to conduct bingo; and no member of an exempt organization shall receive compensation for conducting or assisting in the conduct of bingo in excess of the prevailing federal hourly minimum wage;

(B) If a parent-teacher organization of a school or an auxiliary organization of either a nationally chartered organization of war veterans or a nationally chartered bona fide fraternal organization, elects not to apply for a license to conduct bingo, then those members who meet the criteria of subdivision (A) of this subdivision (b)(7),

may assist in the operation of bingo with its related organization. In no event may such parent-teacher organization or auxiliary or any member thereof conduct its own bingo game and also participate in the operation of bingo with its related organization;

(C)(i) Other provisions of this chapter to the contrary notwithstanding, any organization possessing a valid certificate of registration to conduct bingo may reasonably compensate for security and janitorial services rendered to the organization in connection with the conduct of bingo;

(ii) Compensation paid for security and janitorial services rendered the organizations shall be consistent with the compensation paid for such services by other employers for such services;

(iii) Each organization authorized to conduct bingo shall report to the secretary of state annually concurrent with the annual accounting report required pursuant to subdivision (d)(1), on forms prescribed by the secretary of state, the following information:

(a) Name and address of individuals, companies, or corporations rendering security and janitorial services;

(b) Date(s) when such services were rendered and man hours involved;

(c) Date and amount paid to those rendering the services; and

(d) Social Security number or employer's identification number of individual, company, or corporation, as applicable.

(8) Advertising for bingo games at each approved location conducted under this section shall be limited to:

(A) A sign on the premises of not more than twelve (12) feet in diameter;

(B) No more than one paid advertisement per month in a local newspaper and such advertisement may not exceed six (6) inches by four (4) columns; and

(C) The organization's own publication and mailing lists.

(9) The possession, sale, or use of any bingo supplies and game materials, including but not limited to, bingo cards, door receipts, bingo wheels, bingo indicators, perforators, bonanza bingo

sheets, pull tabs, tear-offs, instant bingo materials, players' choice sheets, bingo cages, flashboards, blowers, raffle drums, ink markers and all other bingo gaming devices procured on and after July 1, 1986 which are not supplied by bingo supplier licensed by the secretary of state pursuant to title 62, chapter 33, or which does not carry markings required by title 62, chapter 33, shall be considered prima facie evidence of a violation of this chapter and § 62-33-111.

(c) Every organization which intends to conduct any bingo game permitted pursuant to the exemptions provided in subdivision (a) (1) shall file a registration statement application with the secretary of state upon forms prescribed by him. The registration statement application shall be accompanied by an annual registration fee of one hundred fifty dollars ($150). The secretary of state shall examine each application, and if he finds it to be in conformity with this chapter and all rules and regulations, he shall approve the registration and shall issue a certificate of registration for the ensuing twelve (12) months. There shall be

a ten (10) day waiting period between receipt of the application for registration and issuance of same.

(d)(1) Any organization conducting a bingo pursuant to the exemptions described in subdivision (a)(1) shall annually and/or quarterly account to the secretary of state on forms designed by the secretary of state and approved by the attorney general, unless their total receipts do not exceed five thousand dollars ($5,000) annually.

(A) The secretary of state is authorized to promulgate rules and regulations to effectuate the purposes of this chapter. All such rules and regulations shall be promulgated in accordance with the provisions of chapter 5 of title 4; and

(B) The conducting of bingo, raffles or similar games of chance shall be considered a solicitation of charitable funds; however, the administration and regulation with respect to such solicitation of charitable funds shall be governed by this section.

(C) The financial accounting report required to be filed for renewals shall be an audit of the receipts and expenditures

of all funds derived from the exempt game and such audit shall be prepared by certified public accountants, public accountants, or by the secretary of state. In the event that such licensee shall fail or refuse to have the audit prepared, then the secretary of state may appoint a certified public accountant, a public accountant or otherwise direct such an audit, and the cost of such audit shall be paid by the licensee. The comptroller of the treasury may, upon requests of the secretary of state, direct the department of audit to prepare such audit. The secretary of state and the comptroller of the treasury shall be responsible for determining that such audits be prepared in accordance with generally accepted auditing standards and that such audit meet the minimum standards prescribed by the secretary of state. The secretary of state shall promulgate such rules and regulations as are required to assure that the books and records are kept in accordance with generally accepted accounting procedures and that audit standards prescribed by the secretary of state and the comptroller of the treasury are met.

(D) The license must be posted in a conspicuous place of the site of the bingo, raffle and similar games of chance. All bingo, raffle and similar games of chance records must be available for inspection at the licensees' principal place of business upon request of the secretary of state or his authorized designee.

(2) In addition to the revocation of the exemption provided in subdivision (a)(1), violation of the fixed limitation of twenty-five percent (25%) on expenses as provided in subdivision (a)(1) shall be punishable as a misdemeanor for the first offense, as provided in § 39-1-202, and for the second and any subsequent offense shall be punishable as a felony, as provided in § 39-1-201, or by a fine of not more than five thousand dollars ($5,000) or both, in the discretion of the court.

(e) In addition, this part shall not apply to raffles or similar games of chance conducted by organizations described in subsection (a) which meet all of the requirements and all exemptions as set forth herein with respect to the conduct of bingo games shall apply to the conduct of such raffles or similar games of chance.

(f) No person under the age of sixteen (16) years, whether a paying player or volunteer worker, shall participate in, or be allowed upon the premises during, any bingo game.

(g) All advertising including but not limited to game schedules, newspaper advertising, door receipts and hand-out fliers by any person conducting bingo, raffle or similar games of chance for an organization pursuant to this section shall contain the correct name and permit number of the advertising organization.

(h) If the secretary of state has reasonable grounds to believe that an organization is in violation of any provision of this section, he may institute an appropriate proceeding to prohibit such organization from transacting any further business or in any way disposing of any contributions made to such organization or altering in any other way the financial status of such organization pending a final disposition pursuant to this chapter and title 62, chapter 33.

(i) Any person or organization in violation of subdivision (b)(9) or any other provision of this section shall be

subject to immediate summary suspension as a licensed bingo supplier or operator, but shall be afforded by the secretary of state a hearing, to be held not more than two (2) months from the date of suspension.

18 U.S.C. § 1955

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section -

(1) "illegal gambling business" means a gambling business which -
(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries,

policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise and baggage

or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of the section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, or any other person in respect to the seizure and forfeiture of vessels, vehicles merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents or other persons as amy be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of action 501 of the Internal Revenue Code of 1954, as amended,

if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

ARTICLE XI, SECTION 5 OF THE TENNESSEE CONSTITUTION

The Legislature shall have no power to authorize lotteries for any purpose and shall pass laws to prevent the sale of lottery tickets in this State.